

THE OFFICE
W^m AND DUTY *Prap*
OF
EXECUTORS.

OR
A TREATISE OF
WILLS and EXECUTORS,
directed to Testators in the
choice of their Executors, and
Contrivance of their Wills.

With direction for Executors in the Execution of of their Office, according to the Law; and for Creditors in the recovery of their Debts.

With divers other particulars, very usefull
and profitable for all persons, be they either
Executors, Creditors or Debtors.

Compiled out of the Body of the Common
Law, by THOMAS WENTWORTH, late
Bench of *Lincoln's Inn*.

The Fourth Edition, Corrected and Amended.

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THE OFFICE

OF THE

EXECUTORS

WILLS AND EXECUTORS

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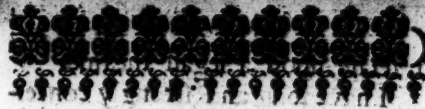
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The Preface.

Midst the Readers of
these Discourses; some
not yet unfriendly may
aske, perhaps, *Quorsum*
hac, or *Quorsum* sic?

Why have we a Tractate and Discourse legal; or why in English, and not rather in the Law language? To whom, yea, also to others, perhaps lesse inquisitive, it will be, as I think; a thing not unpleasing, to heare some reason rendred, why I have set my head and hands to this worke so little in use with those of our profession; why also in English rather than in the language, wherein our volums of Law are for the most part, and well-nigh wholly written.

First, for the matter, viz. my thus commenting or making a

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The Preface.

tractate upon a legall theame.

1. I have long and strongly concei-
ved that the more Nobles, Gentle-
men and others, shall be acquainted
with the Law of the Land, and the
justnesse, equity, prudence and pro-
vidence thereof, the more they will
love it and affect it; *Ignoti nulla cu-
pido*, the want of knowledge of it
causeth the leannesse of love to it.
Therefore to bring Nobles and
Gentlemen into acquaintance with
the Law, is a meanes as well to ad-
vance it in their estimation as to ad-
vantage them by it.
2. I have long thought that we who
are the Professors of our Law, have
beene more wanting to it, than the
Civillians and Canonists to theirs;
who have written very many vo-
lumes: *Spartam quam nactus es, hanc
exorna*, hath been said of old, and
should be assayed anew.
3. More wanting than others before
us of our owne Profession have we
also been, as I think: yet as of old

Brit

The Preface.

Britton, Glanvill, Bracton, besides not printed, *Fleta* and *Ingham*, did lead the way, so since *Master Littleton*, and more lately, *Sir Germin Perkins, Fitzherbert, Seanford, Crompton, Lambert, Kitching, Sir Henry Finch, Dalton*, have troden this path; so as it cannot be taxed with novelty or singularity. I mention not relaters or reporters of Judgments and resolutions, nor meere abridgers, nor Author of Bookes of Entries, expressing formes of Declarations and Pleadings, &c. Because these have trodden another, though for the Students and Professors of the Law, a very profitable path.

The tax and increpation of our late learned, and judicious Sovereigne, upon us the Professors of the English Law, as being wholly in effect addicted to our owne private gaine and advantage, with neglect of the publike, had some strong operation upon me, howsoever upon others, setting for divers yeares past my pen

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King James
in his Pre-
face to his
Booke a-
gainst To-
bacco.

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The Preface.

on worke, specially in Summer vacations, upon divers particular subjects, whereof this is one and the first borne.

5. To this I may adde the Crownes expectation of somewhat legal to bee published and set forth from time to time; as appears by the special Parents successively granted, and renewed for the sole Printing of Bookes of Law. There is one such in force at this present, and another long hath been in remainder and expectancie to take effect upon the expiration thereof.

6. And now to adjoyne *Sic* to *Hec*, viz. the reason of my English writing to that of my writing upon a Law theme. First, receive the said late Kings judgement touching both, expressed in one of his Speeches printed. Thus I wish, saith he, the Law written in our vulgar language; For now it is in an old mixt and corrupt language, only understood by Lawyers, whereas every subject ought to

March 1609

Note.

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The Preface.

understand the Law under which he
lives, &c.

Herein, *Andrew Horne*, one some-
time of our Profession, agreeth
with the said late King, saying, *A-*
busus est que les leges ouesque leur en-
chassons, ne soient seues & connus del
tous : It is an abuse, saith he, that
the Lawes with their grounds be not
known by all. *Ergo*, to be in a
tongue understood by all.

More plainly and fully doth
that our both well learned and well
descended *Saint German*, sing in
confort with our said late scienti-
ous King. For hee first brings in
the Doctor of Divinitie, saying,
that hence-forth he will take more
paines than before he had done, to
know the Lawes of England; for
that knowledge is *Multum necessaria*
& Clericis & Laicis, imo omnibus in
hoc regno commorantibus, etiam in
foro conscientie. And this being in
his first Book written in Latin; after
writing his second Book in English,

A 4

he

7
In his Mir-
rour of Ju-
stice.

8
Lib. i. c. 24.

The Preface.

he expresseth that he so did for this reason, *viz.* To the end that it might be understood by all.

Which of us hath not heard it objected, that we the professors of the Law seeke to hide and secreet the knowledge thereof under this darke and distastefull language, wherein the Law is for the most part written; not that I hold it any just excuse for the nescience or negligence of any, that our books are not in English. Since first, it were easie for any diligent and intelligent man, specially if acquainted with the right French language, to understand our broken or brackish French in a few dayes. Secondly, there be both Statutes and some other law-bookes in English, which are neglected by the most. Thirdly, though care hath been in Parliament in *Edward* the third his time, that Lawyers should plead, that is, argue & debate causes in English, which was often desired by the Nobles and Commons, till at last assented

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ted and enacted, and in Queen Ma-^{2 & 3. Ph.}
ry's time care was taken, that the & Ma.c. 6.
Commissions of Purveyours should in fine
be in English, to the end that all sub-
jects from or of whom they would
take, might both see them to be per-
sons authorised, and so also in what
manner they are directed to use their
Authority, according to the Prin-
ces pious and princely care that his
subjects should not be abused by his
Officers. Yet for this Affaire, of
having all the Law-volumes speake
English, I have not heard nor read
of any desire or endeavour in Parlia-
ment. Fourthly, If the Annals and
Reports were in English, they are so
replete with Debates about formes
of Writs, Returnes, Pleadings, Es-
soynges, Imparlances, Protections,
Vouchers, Ayd-priors, and Coun-
terpleas of both, and the like, as
would easily distaste and discour-
rage any not intending to professe
and practise the Law, from versing
much in them, or passing through
them.

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them. This therefore, as I think, would not much effect the expressed desire.

10 The thing (in my judgment) fit and fruitful to produce that good effect, would be to have extracts of materials of the Law; and that not without some good choice and selection, composed in way of Discourse, or tractate expository, and that in English.

11 I cannot well see or comprehend how any one legall part or Theme may be more usefull to and for the generality of men, and consequently more generally expectible and wished for, then the Office of Executors. For who almost is there, who either is not, or may not be an Executor or Administrator, or at least hath not, or may not have to do with them, either to receive from them, or to pay to them debts or legacies? Or who is there above *Forma pauperis*, that may not be a testator, or Will-maker, to the guidance of whom, even in the choice of his executors, and contrivance

The Preface.

vance of his Will, it cannot but be material to know the office and duty, the right and interest, the power and authority of Executors, yea, of each one Executor where there be divers; yea, to know who may be made an Executor, who not; who can make one, who not; how he may be fashioned, generally or specially; what shall come to him, what cannot be given from him; yea, what goods or chattels shall goe from him, though not given from him. Besides the knowledge for those others necessary of the safest wards or locks for Executors. Their *Scilla* and *Charibdis*, and the best advantage for creditors, &c. towards or against them. To me, considering what parts of Law were most behoveful to be communicated to all willing Readers, none appeared which could challenge of this the precedence, and therefore I gave it the first and leading place. Thus mine owne thoughts. But how farre this
dis-

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discourse may be profitable to any,
and to how many, *aliorum sit iudici-*
um. How many know no more of
these, than of the way of a ship upon
the Sea?




12 Lastly, these are not intended for
the Learned of our profession, who
have drawn or can draw out of the
same fountaine which I did, and so
need not my help; but for their sakes
who are not professors of the Law:
yet so as if any young Students may
in any part receive fruit by my la-
bour, I shall not grudge or repine at
their so doing. *Bonum quo commu-*
nus, eo melius.

The end of the Preface.

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THE

THE
OFFICE
OF AN
EXECUTOR



THE things considerable touching Ex-^{Introdu-}
ecutors, may all, in ^{tion.}
effect, be reduced
to these 3 heads,
viz.

1. Their *Being.*
2. Their *Having.*
3. Their *Doing.*

By the first I intend their Creation
or constitution, with the incidents there-
to. By the second, their interest, fru-
ition, or possession. By the third, their
managing and execution of their Office.
This last was and is the thing principally

The Office of

in my intention, and chief aim of this discourse, but necessarily it must have some *Ingredients*, some *Concomitants*, and some *Consequents*; as he that travelleth from London to York to speak with *J. S.* must needs passe by and through other Towns and Villages, and speak with divers other persons in his journey and returne. To come first to the first; therein wee will consider these six things.

EXEUTOR

CHAP. I.

1. **W**Hether an *Exeutor* and a *Will* be the same thing, or whether they cannot be without the other, and therein of the several kinds of *Wills*.
2. How and in what words an *Exeutor* may be made and created.
3. How he may be in special manner, different from the general, *specific*, *mod*, *limited* or *qualified*.
4. Who may make, or be made, an *Exeutor*, who not.
5. What one may give or bequeath by *Will*, what not.
6. How

6. *How a Will or Executor once made, may be unmade, and what shall amount thereto, viz. a Revocation total or partial; what to new publication.*

Of the Relation between a Will and an Executor.



As to the first, the very name of Executor purporteth in general one to execute somewhat, or to whom the execution of somewhat is committed or recommended: In one particular therefore, an Executor of a Will must needs be such a one to whom the execution and performance of an other mans Will after his death is commended or committed. Or who is constituted or authorized by the Will-maker to do him that friendly office. Hence it followeth necessarily, that a Will is the only Bed where an Executor can be begotten or conceived; for where

Plow. Com.
185 in Wood.
& Davies
case, so ex-
pressly said.

Testamentum
quasi testatis
mentis.

no Will is, there can be no Executor : & this is so conspicuous and evident to every low capacity, that it needs no proof or illustration. On the other side, though much may be written in the name of a Will, many Legacies bequeathed, and many things appointed to be done, yet if no Executor be named, there is no Will; for these two be so relative and reciprocal, as that one cannot bee without the other; if no Will, no Executor; if no Executor, no Will: yet here are two Cautions to be affixed: 1. That a mans Mind, Wil, and Intent, touching the disposition of his goods, being declared, although for want of naming an Executor he die Intestate, so as Administration is to be committed; yet for that here is not only an inchoation; or inception of a Testament: but so farre a progression therein, as *testatio mentis*, that is, the manifestation of the mind of the party deceased, and owner of goods; therefore this mind and intention of the intestate being notified and made knowne to the Judge, who is to commit Administration, is usually annexed (as I take it) to the letters of Administration; and meet so to be, for a direction, for and to the

the Administrator; as well as to the Will fully & perfectly made, but refused to be proved by the Executor, which is usual. Another Caution is, where a man seized of land in Fee simple, disposeth the same, or part thereof, by his Will in writing; this standeth good for the whole or part, according to the difference of the tenure, although no executor be named: So as the party dieth intestate, and Administration is to be committed as touching his goods, and yet hath a Will as touching his lands. This may seem strange, but the reason thereof is an act of Parliament, inabling to dispose of Land by Will in writing: and for that Land is not properly testamentary, neither hath the Executor (if any be) any thing to do or intermeddle therewith, and therefore is the making or not making of an Executor, nothing pertinent to the validity, or invalidity of this devise or disposition of Lands by Will. So as though where there is not *Testatio mentis*, there is not *Testamentum*; yet may there be the first without the later. Having now seen that bequests of Legacies, without making of Executors doth not amount to a Will: Let us now consider whether the sole making of Executors in the name of a Will,

Sum. Sisto.
fol. 32 b.

without giving any Legacy, or appointing any thing to be done by Executors. Whether I say, this be, or amount unto a Will, or not; since here, upon the matter, nothing is willed, and consequently nothing rests to be executed by the Executors, whose office is, as hath been said, to execute the mind, will, and intent of their Testator; and, *Ubi non est testatio mentis, non est Testamentum*, saith the Canonists; for answer hereunto, confessing that indeed to be the office of an Executor; I yet conceive confidently that in the case above put, there is a good Will, and as a Will it is to be proved and approved, for these reasons. First, for that the main part, and principal part of an Executors office, and that which concerns the soul of a Testator (as our books speak) is the payment of his debts; now who knows not that the very making of an Executor is the constituting of such a person who is to pay all debts? and for that cause and end is principally to have and enjoy all the goods and chattels of the testators, and all sums of money to him owing: so as the naming of *A.* and *B.* executors, is by implication a gift or donation unto them of all the goods and

chattels, credits and personal estate of the testator, and the laying upon them an Obligation to pay all his debts, and making them subject to every mans action for the same. And if the Law speak thus much since, *Quod necessarie subintelligitur non deest*, what need then the party expresse it in his Will? If he had willed more then this, as to have given this or that in way of Legacy, it had been needful for him so to have set down in his will, but there is no meet necessity that every man should give Legacies in his Will, the estates of many will not do more then pay their debts, nor oftentimes do so much, so as if they should give any Legacies, it must be a dead, and a void gift. And suppose a man hath much more, and intendeth all to his wife, brother or sister, or other friend, his debts being by such persons paid, since the very making of the party Executor without any more, amounteth to thus much, and effecteth this, what needeth then more words? *Frustra fit per plura quod fieri potest per pauciora*; as we often speak touching legall passages, it is needlesse to write four lines, where two be sufficient. Nor is *testatio*

ment^{is} here wanting, since the Testator hath made known, who shal have the Administration of his goods for payment of his debts: and it is to be presumed, he had no more special Will, since he did not declare more, and left his Executors further to have and to doe, *prout lex postulat*: And who can say, here is nothing to execute? Is the suing for, and collecting of Debts due to the Testator, and paying of Debts by him, nothing? Nay, it is *in hoc negotio*, the *unum necessarium*. Besides, the making of an Executor is a designment of a person to be the testors Assignee, to whom, and by whom divers things may be feasible by vertue of Covenants, Bonds, or other Assurances, as after, where we come to shew how the Executor represents the person of the Testator, will appear: Also of one, who, as our books often speak, is to dispose the Testators goods for the best advantage of his Soul; but instead of that, (since as the tree falleth so it will lie or rest) I will say, as is most for the honour and reputation of the Testator.

Of the kinds of Wills

NOW Wills are of two kinds, or may be two waies made, *viz.* Either by writing, or nuncupative, that is, by words not put in writing during the Testators life; for after the Testators death, this verball Will must be reduced to writing, and have the Seale of the Ordinary or Judge spiritual thereto affixed; and then it is as effectual, and of as good validity as if it had been in writing in the testators life-time; and so doth the Common-Law allow and approve thereof.

But I advise all to make Wills by writing, & not to leave them to the doubtful fidelity, or slippery memory of witnesses. For as of Leases paroll hath been said, That they be Leases perjured, or of perjury: so of Wills parol may be feared. Besides, many times a man doth speak and declare this or that part of his Will, which his wife, child, or friend dissuading, he letteth that purpose and part of Will to fall, and departs from it: yet Witnesses wishing it to stand, will perhaps affirm it as part of the Will. As for a Will-gift, and disposition of land of inheritance, if it be not fully written

4 Hen. 6. 10.

E. 4. 1.

If it be written and brought to, & approved by the Testator in his life, it is a will in writing.

14 H. 6. 5.

vid. 5. H. 5.

1. H. 5. de

16 Eliz.

written before the death of the Testator, or done so farre (at least) as concernes the disposition of lands, it cannot be for that part made good by reducing it to writing after his death. As for goods and Chattels, it may: yet if it be written before the death of the Testator, if it be never brought to him, or read to him after the writing thereof, it is good enough; and that not only for Land, as the case resolved in K. Ed. 6. his time was, but also for goods and Chattels, so as there be an Executor named: But whether that we say this is a Will nuncupative or in writing? And surely, I think that this is a Will in writing, and not only verball, though it want subscribing: for we know that many cannot write their names, but only marks, and what is that? Nay, suppose one want hands, and cannot write so much as his name, yet doubtlesse this man may make a Will in writing, it being written by his direction, as his Will which he dictated; nor is the subscribing of the name of the maker any essential part of a deed, much lesse of a Will, which needs not sealing, as a Deed doth. Now put we the case on the other side, that many bequests or Lega-

Legacies be named in a Will, and many things expressed to be done, and no Executor is named in the writing, only by word of mouth *A* and *B* be named Executors: This I thinke confidently is no Will in writing, but nuncupative only, for that one essential part of the Will, *viz.* making of Executors is wanting in the writing: Nay, the pointing of him Executor who is named in a note left with *A B.* is no sufficient making of an Executor, saith the *Summist.* And of such nuncupative Wills, *Mr. Perkins* reasonably saith, that it properly hath place, when one suddenly taken with sicknesse violent, dares not stay the writing of his will, for fear of prevention by death; and therefore prays his Curate and others to witnesse what his Will is. To this Will not written there must be seven witnesses, and such as come not by chance, but are especially called for that purpose, saith the *Summist.*

*What shal amount to a making one Executor
or What words are requisite thereunto.*

HAVING before made to appear, that the being of an Executor, is an essential

*Tit. de Test.
Sum. p. 10. f.
443. b.
If he survive
and live a
long time,
not confes-
sing to be
dressed by
witnesses, he
should not
stand as the
will.
Id. f. 444. a.*

sential part of a Will, and so *deesse*, and not *de bene esse*, only of a Will and Testament; let us now see, First, By what words an Executor may be made. Secondly, *De modo*, in what manner it may be done, how the power and authority of Executors may be limited and divided. As to the first, though one doe expressly by Will name or appoint any to be Executor, yet if by any word or circumlocution he recommend or commit to one or more the charge and office which pertains to an Executor, it amounteth to as much as the ordaining or constituting of him or them to be Executors: As if hee declare by his Will, that *A B* shall have his goods after his death, to pay his debts, and otherwise to dispose at his pleasure, or to that effect; by this is *A B* made Executor, as was conceived by the Judges in the late Queens time. And long before that, it was held, That if one doe will only that *A B* shall have the Administration of goods, he is thereby made Executor: yea, in the said late Queens time, one giving divers Legacies, and then appointing that his debts and legacies being paid, his wife should have the residue of his goods, so that she put in

secu.

If *A B* be made Executor, and to him be some goods are devised to be disposed for his soule, Dis by this an Executor for chuse.

39 H. 6. Dy.

190.

M 15. & 16

Eliz.

31 H. 6. 6. 7.

security for the performance of his Will ; by this, without more , was shee an Executor , as was held by three Justices. (*Viz.*) *Manwood, Harper and Mounson*, in the Lord *Dyers* absence. And so also where an Infant was made Executor, and *A & B.* Overseers , with this condition, That they should have the rule and disposition of his goods, and payment & receipt of debts unto the full age of the Infant ; by this were they held to be Executors in the meane time. And if *A* be made Executor, and the testator after in his Will expresseth that *B* shall administer also with him, and in ayde of him ; here *B* is an Executor as well as *A.* and if *A* refuse, *B* alone may prove the Will as Executor, notwithstanding it be only said, he shall administer with *A.* and in aid of him : thus many wayes, and by divers words of implication one may be made Executor, although not expressly so named by the Will. But if *A* be made an Executor, and *B* a Coadjutor , without more, he is not by this an Executor with *A.* as in *K H. 6.* his time was held; nor hath such Coadjutor or Overseer any power to Administer or intermedle, otherwise then to counsel , perswade and advise ; yet

31 H. 6, 6.

24 Ed. 3

F. Exec. 111

39 Ed. 3. 39

yet I think he may, and in conscience should so do: And if that will not prevaile to rectifie negligence, or miscarryings in Executors, he shall well perform the trust reposed in him, if he complain in the spiritual Court, or Court of Conscience; and it is reason, I thinke, that so doing upon just cause, his charges be borne out of the Testators estate, or the Executors purse, who otherwise would not be reformed.

How an Executor or his Executorship may be limited or qualified in speciall manner, different from the generall.

NOW let us see how this making of an Executor may be specially qualified; and first, the time may be limited when he shall first begin to be Executor, and that either certainly, or with some contingency. Secondly, the creation may be conditionall. Thirdly, it may be partiall or dividedly, and not intirely.

As to the first, one may appoint 7 S. to bee his Executor a yeere or more time after his death, this is good.

So

So also if *A* appoint *B* his son to be his Executor, when hee shall come to full age, and in the meane time he dieth intestate. Againe, one may appoint the Executor of *A* to be his Executor: and then if he die before *A*, he is intestate untill *A* die. This creation may also be conditional, and the condition may either be precedent or subsequent. In the time of *K. H. 6.* one named *A* and *B* his Executors, and if they would not take it upon them, then *C* and *D.* should be his Executors, and then there *A* and *B* refused, and the question was, whether in suite against the debtors of the Testator, *A* and *B* should joyn with *C* and *D.* as where foure Executors being named, and two refuse, and the other two prove the Will, yet all four must be named in suite against the Testators debtors, as was there admitted: but in the principal cause it was resolved, That the suite should be only in the name of *C* and *D.* for that the appointment of them Executors, if *A* and *B* did refuse, did imply, that then they onely should be Executors. And here all four were never made, nor intended to be Executors, but *A* and *B* upon a condition subsequent

*Vide Gros-
brook & Fox
Plewd.*

A and *B*
made Exe-
cutors, but
not *B* to in-
termeddle
during the
life of *A.*
and good.
32 H. 8. Bra.
155.

3 H. 6. fo. 6.

sequent, that they should not refuse: and
C and *D* upon a condition precedent,
viz. if *A* and *B* did refuse. It is usual to
 make one or more Executors, condi-
 tionally, that they put in security to pay
 Legacies, or in generall to performe the
 Will; nor was it ever doubted, as I think,
 but that this was good: yet I should ad-
 vise, that such condition be plainly thus
 expressed, *viz.* either thus; that if *I* *S.*
 do put in security, &c. by such a day,
 that then he shall be Executor, else not:
 or thus, *viz.* to make him Executor
 conditionally, that before he do admi-
 nister (Funeral perhaps excepted) hee
 shall put in such security; else perhaps
 hee being Executor till the Condition
 broken, in that mean time he may have
 disposed of all, or most part of the Te-
 stators estate. In the late Queens time,
 there was a Case remarkable to this pur-
 pose: One Willed, that if his wife suffe-
 red *I* *S.* to enjoy Black-acre (being belike
 part of a Joynture) for three years,
 then she should be his Executor, or else
A *B.* should: and the question was in
 the Common Pleas, whether presently
 before the end of the three years, shee
 were Executor, or not till she suffered
 the

P 33 Eliz.
 Also Francis
 her case.

3000001

the Land to be enjoyed three yeers ; and it was held by all the Judges, but the Lord *Anderson*, that she was presently Executor, until she should disturbe *I S* &c. for upon that done, it was agreed, that the Executorship would, by vertue of the Condition, be transferred from the wife to *AB*. But now during these three years might she have disposed of all the goods of her husband ; yea, within one of these three years, and lesse time, and then have broken the Condition, and have left to *AB* a dry Executorship.

Now to the third Point, one may divide his Executors power three wayes, viz. Really, Locally, or Temporally. Really thus ; He may make *A* his Executor for his plate and householdstuffs : *B* for his sheep and cattel, *C* for his Leases and states by extent, *D* for his debts due unto him, and so divide the power and Administration of his Executors at his pleasure. He may divide them also, or their power Locally, viz. *A* for his goods in *Com. Buck.* *B* for those in *Com. Oxon.* and *C* for those in *Com. Berk.* He may also divide them in time ; viz. his wife, or any other person to be Executor during her life, or during the minority

19 H. 8. 3.

19 H. 8. Dyer

4. Hil. 33.

Ely. in Com.

b.

32. H. 8. Bra.

115.

C

minority

nority of his son, or so long as the con-
tinues widow, and after his son to be Ex-
ecutor. So of like limitations or divisions,
either for time, place, or things, where-
with they shall intermeddle. Nay doubt-
lesse, one may be made Executor for one
particular thing only, as touching such
a Statute, or Bond, and no more; and
thereof good use may be made, as I think
thus. Many have Bonds, Statutes, and
Recognizances, for warranty or enjoy-
ing of Land, or freeing, or saving harm-
lesse from incumbrances, in general or
particular: Now he which hath these,
selling the Land, may by Letter of At-
tornie lawfully assigne them to the party
who buyeth the Land or Lease; but this
notwithstanding, the interest remains in
him who selleth, and by his outlawry
they may be forfeited, or by him released
any Bond to the contrary notwithstan-
ding; and if he die, the interest in Law
will be in and go to his Executors, and in
their names; only Suit or Execution may
be had and maintained.

*may. If not
affers in
or when
raised.*

Now then, if the Vendor, besides ef-
fignment, make, as to this Statute, Re-
cognizance or Obligation, only the Ven-
dor Executor. By this the interest, af-
ter

ter death of the party, will be in him actually and really to his more safety, since none but he can relese or discharge, nor any other name need to be used to sue, or take benefit thereof. But *Quar.* If the Vendee, His heirs and assignes may be made Executors, so as that securitie shall go to them one after another without renewed making of Executors. Thus if the party make no other Executor, he dieth intestate as to the rest of his estate, and as to this specialty only shall have an Executor, and must have a Will proved: and in case he doe make another Will for his state residue, there must be two Wills proved. But in the other case, where by one only Will, one is Executor for one part of the estate, and another for another, there being but one Will to be proved, one proving of it sufficeth. And though in the premises of a Will two be made Executors joyntly and equally; yet there may be a *Proviso*, that one shall not meddle during the others life, so as they shall be Executors successively, and not jointly: and thus also to other purposes aforelaid, a subsequent clause or *Proviso* may make the partion and division of authority. But if the *Proviso* or

33 H. 8.

Bro. Exec.

55.

19. H. 2. Dy.
3. 4

clause subsequent, be meerly contrary to the premises, it will be void; as where two were made Executors, with a *Proviso* or clause, that one of them should not Administer his goods. This was held voide for repugnancy by *Brudnell* and *Englefield* Justices. But *Fitzherbert* Justice was of mind, that it was not void, nor utterly repugnant. For the other might joyne in suits, though not Administer; and Justice *Shelly* was of a third opinion different from all the rest, viz. that here was a repugnancy; but the last clause should control the premises, and so this one only should be Executor.

Who may make an Executor.

SOME persons may be unable to make Wills, and consequently Executors; for that is all one: whosoever may make a Will may make an Executor. There be nineteen severall kinds of persons unable, as the *Canonists* say, to make Wills, but with many of them wee will not intermeddle, because we find no mention of them in our Law. The persons principally, & most usefully to be considered of by us, are either the defective in understanding,

as Infants, Idiots Lunaticks, and the like; or defective in power or interest, as women covert or married, persons outlawed, attainted, convict or excommunicate. Some touch we wil give of others, as Aliens, Corporations, Villains, Monks & Friers. As for infants and women covert, because much is to be said of each of them and their Administrations, we wil forbear to treat of them in this place; but after will do it of each severally.

To begin with an Idiot; naturally he is not able to make a Wil as was resolved in the Spiritual Court, because he wants the use of Reason to conceive what it is fit for him to Wil; nor doth the Common Law oppose this, as I think.

3 Eliz. D.
203, 204.

A Lunatick, having *Lucida intervalla*, that is, some seasons of enjoying his right mind, and freedom from his Lunacy, may in those times of his right minde make a Wil & Executors, else not; for even one by age or sickness become of *non sana memoria*, is unable to dispose of lands or goods.

One deaf and dumbe born, may make a Grant, saith Master *Perk.* if he have understanding which is hard, as he confesseth, consequently much more a Will; but in the time of K. Hen. 8. it is left a

Vide plus la Perk. 5. 6. 33. H. 8. Dy. 55, 56. Vide 26. Ed. 3. 63. lib. 1. m. 396.

18 Ed. 3. 53.

26. Ed. 63.

So in effect.

44. Ass. p. 30.

P. 31. E. 10.

Paschalis ap.

P. 1. 1. 1.

Cases

Cases

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demurrer, whether a Deede by such, be good or not. If but mure, he may wage his Law, and attorne by signes, and so perhaps by signes declare his Wil.

44. Ass. p. 36.

An Alien may make, or be an Executor, so as he be not an Alien enemy, for such cannot sue, as in the late Queenes time was held; but there the doubt was whether a subject of Spain were at that time to be held an enemy, no war being proclaimed between the Kingdomes, though hostility exercised.

As for persons Attainted, Convicted, or Out-lawed, it will be said, that these can have no goods of their owne, and consequently they can make no Wills nor Executors; and it is not to be denied, that we find it pleaded sometimes by Executors, that their Testators stood out-lawed. But first it is clear, that all and every of these may have goods as Executors to others, which neither are forfeited by Attainder or outlawry, nor divested by marriage or Villanage. Therefore as touching them, they may make Testaments. And that all these sorts of persons may be Executors, is also evident, so also touching Villains, Monkes and Friars,

Priors, who can have no goods to their
 own uses. And that one attainted of
 felony may have an Executor, appears
 by the Case in the late Queenes time,
 wherein it was long debated, whether
 such an Executor might maintaine a
 writ of error, or not, to reverse the at-
 tainder of the Testator: And as for o-
 ther Out-lawries, the Plea thereof by
 the Executor, that their Testator was,
 and died out-lawed, proves not a nullity
 of the Will, or Executorship: for then
 they might have pleaded, that they were
 never Executors. But it tends to this,
 that no goods did, or could come to them
 for satisfaction of the debts by reason of
 out-lawry; yet it hath been delivered,
 not of old only in many books, but by
 some of late, that debts upon contract,
 where the defendant may wage his Law,
 are not forfeited by out-lawry, nor un-
 certain damages for trespassse in battery
 or false imprisonment, &c. *Quar.* Of
 breach of Covenant. But goods taken
 away by a trespassser, may yet be for-
 feited by the attainder or out-lawry of
 him from whom they were taken, for
 that the property in right still appertai-
 ned to him, and he might have taken
 them

29 Aff. P.
 63. 49. Ed.
 3. 5. 50.
 Aff. P. 15
 33. H. 6. 27
 9 Ed. 1. D.
 26. 2. 1. 1. 1.
 Co. 1. 1. 1. 1.
 1. 1. 1. 1.
 19. H. 6. 47
 30. Ed. 3. 24
 16 Ed. 4. 7
 5 Ed. 3. 53
 4. 1. 1. 1.

them again wheresoever he found them , therefore the action for this shall not come to his Executor, but for the other not forfeited, it may.

25. H. 7. fo. 7.

Sum. Silv.
1st. Toffam.

Whether an Excommunicated person be able to make a Will or not , may bee some doubt, since *Keble* denieth him ability to present to a Church ; and in the very point anciently the opinion of *Canonists* hath beene Negative , but more lately grew Affirmative.

Who may be Executor more.

22. Z. 31

21. B. 6. 30.
A Clark at-
taint may be
an Executor
by Past.
Just.
Pascaris de
Frunday.
But an Ali-
en enemy
cannot sue
as Executor
P. 31. Ch.
3. Jus. cap. 5

AN Excommunicate person cannot sue ; that is, proceed in suit as Executor till he be absolved , there being danger of Excommunication to all that converse with him ; but this makes not a nullity of his Executorship , nor overthrowes the suit, but stayes it only from proceeding untill absolution. As for persons attainted or outlawed , we have before spoken Affirmatively in way of proof, that they may make Executors for continuation of the Executorship ; so of Aliens, and others before. Recusants convicted at the time of the death of any Testator, are disabled to be his Executors. Whether Corporations, Compound,
or

or consisting of divers persons, may bee made Executors or not; I doubt. First, because they cannot be Feoffees in trust to others use. Secondly, they are a body framed for a special purpose. Thirdly, they cannot come to prove a Will, or at least, to take an oath as others doe.

What a man may give or dispose by his Will.

HAVING considered of the makers of Executors by Will, and of them so made. Let us now consider what by this Will may be disposed, given, or bequeathed. And first, he who himself is an Executor, cannot by his Will give or bequeath to any other the goods, chattels, or credits he hath as Executor, the property not being altered, for that he hath not them properly as his own, or to his owne use: only he may make a continuation of the Executorship, and his Executor shall have them as Executor to the first Testator, as was resolved by the Judges of both Benches, in the late Queens time. And if he bee Administrator, the bequest is then also void, nor then will they goe to his Executor, but to a new Administrator; but on his death

*Brasby
Vers. Gran-
ham, Plow.
Comm. 529.*

*H. 20.
E. 2. w. 2.
H. 20.
E. 2. w. 2.
H. 20.
E. 2. w. 2.*

At any time, in his life he may alter the property.

death, he may give them by Word or Deed, though not by Will. Next, if a man have debts owing to him, as many have much, it is considerable, whether by way of bequest in his Will, hee can give away these to any from his Executors. And doubtlesse he cannot effectually in Law, they being not subject to assignment unto any except the King. So as, if he give such a debt to A. and such to B. yet must the suite for them be in the name of the Executor; and so also the Release or Acquittance for them, and not in their names to whom the bequest is. But when they be received, if there be no debts to pay, the Executor ought to deliver them to the party to whom the bequest is, and thereunto may be compelled in Court of Conscience, or in the Spirituall Court. Therefore the Case of the bequeathing money payable upon a Mortgage is in this manner to be understood to be good, and not otherwise as I take it. And that is joyntly with any other estated in Lands or goods, can give no part by his Will, but all with survivors: but by act in his life he may dispose of his part, and the Assignee may dispose of his moiety by Will, yet though

So 48 E. 3.

f. 14, 15.

Where the

bequest was

to one of the

Executors,

it was held

that the o

ther Execu

tor might

release it.

If sufficient

officers to

pay all one

as if none.

48. E. 3.

14, 15.

Ed. 3. f. 14.

Tis. Cond. 9

Where both

stated joint

ly by one

Grant.

Differences

between

joint tenants

and tenants

in common,

holding by

several

Grants.

it be half an Horse or Oxe, that cannot be divided. So of a Lease of Landes, or Tithes, or Grant of goods to two, *habendum*, one moiety to the one, and the other moiety to the other; each may give his moiety by Will. But if one be possessed, or estated for years by Lease, Wardship, or Extent &c. in the right of his Wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of these; but notwithstanding they will remaine unto his wife upon his death; but yet his gift or Grant of them, taking effect in his life time, would bind his wife and carry away the interest from her. If one be Tenant for the lives of one or more others, as oft times men take Leases for lives of younger persons than themselves, this cannot be by Will disposed of, for that it is no chattel, nor is it within the Statutes of Wills for that it is no state of inheritance: Therefore let the party look to convey it in his life time, lest it go to an Occupant, *viz.* him who first shall enter. If it be an estate in Land, he must either make Livery, have a bargain and sale inrolled or covenanted to stand seized to the use of his wife, or some of

Another
kind of Te-
nants in
Common.

his

his blood, or make a Lease for yeares, determinable upon those lives: Good it be by bargain and sale for yeares, if the thing be in Lease, that so without Inrollment or Atturment the Rent may passe; else a bargain and sale may be made for a moneth, or such like time; and then a Release or Grant of the reversion, in stead of Livery and Seisin. But if a man have a Lease for never so many yeares, determinable upon life, or lives; that is, if such or such live so long (which unskilled persons call a Lease for lives) this State may wel enough be given and disposed by Will, because it is but a chattel. If a man seized in Fee, or in Tayle of Land, having Corne growing upon it, and by his Will doe give the Corne, and die before severance, this is a good bequest; because, the Corne should have gone to the Executor. So it is also of a Parson touching his Glebe, and a man seized in the right of his wife, or his owne right but for life. But as for trees growing upon the ground; these can no otherwise be given by Will, then as the Land it self upon which they grow, may be given; of which matter,

*Stat. Merton
cap. 2. vidua
possum Lega-
re rem de do-
tibus quam
de aliis &c.*

as not pertaining to the Office of Executors, viz. How, and in what manner Lands may be given by Will, I intend not to treat in these discourses.

Of the Revocation and Countermand of Wills, and new Publication.

Quar. If the trees may be devised by the Statute of Wills, without giving the Land itself.

HAVING considered of the making of Wills and Executors. Let us before we come to the *Probat*, consider of Revocation, for that may take away the force of a Will rightly made. A Will therefore having two parts, viz. *Inception*, which is the making; and *Consummation*, which is the death of the Testator or maker of the Will, there is power in him at any time before death, to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new Publications, or *Reaffirmance* of Wills, in whole or in part. As therefore a Will may be made by Word; So also may a Will made in Writing be by Word revoked or disannulled for since every making of a later Will is a Countermand and suppression of the former Will, and since a Will may be made *Nuncupatively* or by Word, and

so

so by making a Verball Will, one may
 revoke a written Will. It will thereup-
 on follow, that one by Word may ex-
 presse the alteration of his minde thus
 far, that the Will by him formerly made,
 shall not stand, but be revoked and an-
 nulled; and this will stand and be effe-
 ctual, so as if he after die without ma-
 king any new Will, or new Publication,
 or Reaffirmance of the former, he dieth
 intestate or without will. As a Will may
 be wholly revoked, so also in part: Here-
 about a good resolution was in a *Kentish*
Case, where one *Rare* by his Will in
 writing did give some Gavel-kind Land
 to one *Harrison*, and five dayes before
 his death, said in the presence of witnes-
 ses, that this gift should not stand, and
 that he would alter it when hee came
 home, desiring them to bear witnesse
 of his Revocation. Now before hee
 came home he was killed by the said
Harrison, who caused the Will in writ-
 ting to be proved; and after he was ac-
 tainted and hanged for the murder, and
 his Sonne by the Custome of *Kent* (viz.
 the Pacher to the bough, and the Son
 to the plough) entred into the Land,
 and this manner of Revocation by word
 only

only was held sufficient; although the Will in writing were not cancelled nor defaced. And the like resolution for verbal Revocation, is implied in the Case of *Forse and Hempling*; where it being resolved that a *Feme Covert*, or married woman by word Countermanding and Revoking her Will formerly made, when she was a sole or unmarried Woman, this was not effectual, nor of force, by reason of her Coverture, taking away the freedome of her Will. Hereby it is implied, that another who hath freedom of Will may by Word sufficiently revoke a Will in Writing; and so was it since also admitted in the Case betweene Sir *Edward Mountagne* and *Jeoffryes* touching the Will of Sir *Ja. Jeoffryes*: but there a difference was conceived betwixt saying, I wil revoke my Will, which only expressed a purpose or intent, and therefore was no present Revocation; and saying, I doe revoke it, or it shall not stand, or my heir shall have my Land, which crossed the gift of it by the Will. And as Wills may be wholly or in part revoked, so may also the Executorship of one or more of the Executors, and yet the Will may stand in all the other parts

M. 28. & 29

Ep. ca. 100.

f. 60.

7. H. 6. c. 13.

M. 38. 39.

614.

parts, so as there be any one Executor or more unrevoked: but if all be revoked, then the whole Will is revoked, because no Will can stand without Executors: and this Revocation may be by Word only, without being expressed in the Will or any other writing. But I would wish all to expresse such Revocation in the foot of the Will, or that the name or names of the Executor or Executors so revoked be expunged or blotted out of the Will, and that this be done in the presence of some witnesses to testify the act and intent of the Testator.

*Vide 6. F. 6.
Dy. 74. &
3. & 47. &
Ma. 43. a.*

Again, Revocations may be by act in Law, as well as in fact, or by direct and expresse terms, as in the said Case of *Mountague and Jeoffries*, where Land being devised by Will, and the Devisor after making a feoffment, though there were some defect in the Livery, to make it effectual; or if he made a bargain and sale, that was never inrolled, or granted, the reversion, but no attornment had, so as the Land passed not, yet in all these Cases the Will or gift of Land stood revoked: But in Case he had only Covenanted that he would have made such an estate, and not done it, this was held

to

to be no Revocation. And so by some, in case he do but make a Lease, leaving the Fee-simple as it was, but of this *Quare*; And if a difference may not be betwixt making a Lease for years, and a Lease for life, which altereth the Freehold. If a Lease for twenty years be bequeathed to / S. and after the Testator maketh a Lease for fiftene years, reserving a Rent, I take this to be no Revocation of the bequest; but if the Testator after this Will made, take a new Lease for a longer terme, so as the former Lease is surrendered in fact or in Law, this must needs be a Revocation of the bequest, or at least an adnullation thereof; and that although the bequest were generally of his Lease, not mentioning the number of years: for this which he now hath, is another Lease, and not that which hee had at the time of the making of the Will. So, if one give his black gelding by Will, and after, before his death, he selleth or giveth away that Horse, and buyeth another black one, this new gotten Horse shall not passe by the Will, because it was not the Testators at the time of making his Will. So also, if the Crop in the Barn be bequea-

D

thed,

thed in *October*, and the party lives til that time twelve month, having sold that Crop and Inned a new, this later Crop shal not passe by the Will, and the former cannot.

Again, as revocation may be by alteration of the state of the Devisor, in the Land Devised; so may it also be by alteration, in some case, of the state or quality of the person of the Devisor. As if a woman sole make a Will, and after take a Husband, this without any more, as is resolved in the said case, of *Forse* and *Hembling*, doth work a Revocation, or adnullation of the Will, for that else it should be irrevocable, since shee having lost the freedome of her Will, cannot actually and directly make a Revocation, as we before have shewed. But notwithstanding her Will be revoked, yet in case her Husband before or after marriage with her, were bound or Covenanted to perform this womans Will, if he so do not, by paiement of the legacies therein bequeathed, his Bond or Covenant will stand good, and be suitable against him, as was adjudged touching the Will of *Elizabeth Smaleman*, married after her Will made to one *Wood*, who first was bound to perform it. Yet another case there

M 25, 26
Eliz.

there is of Alteration in the state of the Testators person, which makes no Revocation of his Wil. As if he being of sound mind and ability, make a Will, and after becometh frantick. In this case this is no Revocation: So as his Wil stands till his death irrevocable, if he recover not. Now of a Will Revoked, there may be a reviver by a new Publication, and thereof now.

Of new Publications.

HAVING shewed how a Will may bee revoked, and so lose its force; let us now see how without making a new Will, that so revoked may be revived, and set on foot againe. And that is divers wayes: as First, by a *Codicell* annexed after thereunto, as was resolved between *Beuford*, and *Barnesot*, in the Kings Bench. Secondly, by adding any thing to the Wil, or making a new Executor. Thirdly, by expresse speech or word, that it should stand or be his Wil; as I conceive, to have been the better opinion in the said case of *Montagne* and *Jeoffries*, wherein yet was much difference of opinion, both touching

*M 38, 39
Eliz. in ba.
reg.*

44. Aff. p. 36

44. Ed. 3. fol.
33.

Revocation and new Publication. If a man having made a former Will, do make a later, which is more than a bare Revocation; yet if afterward lying upon his death bed, and speechlesse, both these Wills be delivered into his hand, and he required to deliver to one of his friends about him, that Will which he would have to stand, and to keep in his hands the other; bee thereupon delivereth to the Minister or other his neighbours, the first made Will, retaining in his hands the later, as was done in the time of *Edward* the third; here the former will, though made void many years before by the later, is revived, and shall stand as the parties Will. But now put the case that a bequest at the first is void, yet by publication after, it may bee good; as if one give to *Sarah* his wife a piece of Plate, or other thing, and hath no such wife at the time; but after marryeth one of that name, and then publisheth his Will againe; now this shall be a good bequest. So if one Devise Lands or Goods which one hath not; If he after do purchase the same, and then say that his Will before made shall stand, or bee his Will, It shall be

be a good Will and Bequest, for this in effect a new making. And though most of the precedent cases be of Revocation of particular parts of the Will, and not of the total: Yet first, be it considered that that part so revoked was in effect the substance of the Wills: Next, it is easily discerned that if one part be revocable, so is another also; And thus Revocation may spread it selfe over the whole; nay, doubtlesse the whole *Uno flatu*, may be revoked, as well as by parts, even as a fagot may be put wholly into the fire, as well as stick by stick. And as the *Velleities* or disposing parts of the Will, are revocable and revivable by new Publication as aforesaid, so is also the constitution of Executors. As if one of the Executors names bee stricken out, and afterwards a *set* be written over his head by the Testator, or by his appointment, now is he a revived Executor. So if the Testator expresse by word, in the presence of Witnesses, that the party put out shall yet be Executor; but now I mean, where the Executors name is not so blotted out, but that it may bee read and discerned;

3 & 4. P. M.
Dy. 143.

for else the *ſet* is upon nothing; and if the Verball reaffirmance ſhould renew his Executorſhip, then muſt the Will be partly in writing, and partly *Nuncupative*, his name not being to be found in the written Will.

CHAP. II.

Of the State of things inſtantly upon the Teſtators Death, before any Will proved.

Here we will conſider theſe ſeverall things.

1. *What is wrought by a gift of a thing certain and known, as the White Horſe, the Red Cow, &c.*
2. *What by a Bequeſt to an Executor.*
3. *What wrought by a Release in the Will, to a Debtor.*
4. *What by making a Debtor, or Creditor, an Executor.*

AS touching the firſt, *viz.* the bequeſt of a Chattel real, or perſonal, which the Teſtator had in poſſeſſion, notwithstanding that

that if the said Testator had by his Deed or writing, or but by word on his death-bed, or before, given these his goods, and dyed before they had been taken, he to whom they so were given, might have taken them; yet in this case of gift by Will, neither can the Legatee, *viz.* he to whom they are bequeathed, either take them, or recover them from the Executor, or a stranger taking them, by any Suite at the Law, for that he hath no property in them; yea if the Bequest be to himselfe who is made Executor, be it of Lease, Plate, Cattell, &c. They shall not vest nor settle in him as Legatee, but as Executor, until expresse, or implied election: but he is to have and take the same by way of Legacy. And the reason in both cases is this, *viz.* That the Law prefers debts, and the satisfaction of them before Legacies, and ties Executors also to that rule, and therefore will trans-ferre nothing from or out of the Executor, till he having considered of the State of the debts to be paid, and goods out of which the same are to be paid, shall find that safely this or that legacy may take effect without making any defect in payment of debts, or drawing

1 & 2. P. &
Ma Dy. 110
a. & 139. b.
vide Co. 8. f.
95 & 96.

Of the se-
cond. See
Co. 10. f. 47.
652.
So resolved
pas. Trin. 37
Eli. in h. a. ad
only Gov.
contr. Par-
man, pl. &
Simes deff.
See more of
this Tit. Le-
gacy: and
of the assent
of one Exe-
cutor only.

upon him and his owne goods any damage or losse as a waister : and thereupon shall assent to such Legacy. Thus now is the Law taken ; but heretofore some opinion hath runne otherwise, *viz.*

27 H. 6. 2.
Of late perhaps some single or sudden opinions may also have run that way, but in *Perkins* case the point was divers times argued, and then adjudged as before.

To bee bought.

That he to whom any Bequest was made of a thing known and certain, might take it without any assent of the Executor. & that when to the Executor himselfe any good or Chattel movable or immoveable was bequeathed, in case there were otherwise sufficient goods, for satisfaction of debts, the same should instantly upon the Testators death, without any act or election by the Executor, bee transferred into, and unto him in his own right, as a Legacy, and not remaine in him as Executor. As for summes of money bequeathed, or so much in Plate or Rings, it is evident that they must be had by the delivery of the Executor : Yet hath the Legatee such an interest before delivery, as that dying before payment, it will not go to his Executors. But as I take it, no such person to whom any thing certain is given by Will, can make any gift or grant of it before the Executor have assented to his having thereof ; Nor perhaps will the Executors assent, after the grant

grant, have such relation, as to make good the grant precedent; why so y^t, more then an attornment of a Lessee, which is a like assent to the grant of another? And *Quere* if by the outlawry of the Legatee, before the Executors assent, this thing bequeathed be forfeited.

Quar. Of
thi: see
more after
Tit. Legacy,
thereabout.

If without just cause an Executor will refuse to assent, he is compellable by Law Spiritual or Court of Conscience, yet if Spiritual Court presse to doe, where is just cause to stay, a *Prohibit.* lieth, *ut Crido*; for since executors stand liable to recovery of debts against them by Common Law, it is reason that Law enable them to keepe wherewith to pay. And here yet note some seeming opposition in the Law; for where before great difference was shewed between a Devise or Bequest, and a gift or alienation executed in ones lifetime; Yet the Lord *Dyar* reports it to be resolved, that where a Lease for years was made upon condition, that the Lessee should not alien in his life time, that yet a Bequest of this Lease by his Will, was a breach of the Condition, as being an alienation in his life time.

3. Of a discharge by Will to a debtor, some question may be, whether to perfect

perfect and make good this, so as the debtor may plead it in Bar, there be not requisite, as in the former, an assent of the Executor. On the one side, since this giving is a forgiving, for he to whom it is bequeathed, cannot otherwise have it then by way of retainer, it may probably be said, that here needs no such assent of the Executors, as in the case where any thing is to be transferred; for here is rather an extinguishment, and an exoneration than a passage of a Chattel by way of *Donation*. On the other side, it is probable that it being but a Bequest, and so a Legacy, since debts are in Law and Conscience to be satisfied before any Legacies, that therefore the Executor having not sufficient otherwise to satisfy his Testators debts, may sue for this debt, and refuse to suffer it to passe away as a Legacy. And to this opinion doe I encline, as best for Creditors; and satisfaction of debts is by Law respected as an act greatly concerning the Testators soule. But some wil perhaps make a contrary doubt, that although there be an assent of the Executors to this discharge, yet it will not amount to a legal release, for that a debt,

at

at least, if it be by specialty, cannot be released but by Deed, and a Will is no Deed, for a Seal is not necessary thereunto, though it be fit and convenient; whereto I give this answer, that a Will, though it be not properly and legally a Deed, for it may be good enough without a Seal, which is an essential part of a Deed, yet hath it the force and effect of a Deede: for as a Release cannot be made but by Deed, so neither can an Estate or Interest, though but for years, in Tithes, Advowsons, Commons, Fairs, and like things, be granted or assigned otherwise then by Deed; yet it is clear that such a state for yeers in any of these may be given by Will, as well as a lease of Land, which proves a Wil to have the force and effect of a Deed.

*Of making a Debtor or Creditor, Executor;
and first of the Debtor made Executor.*

Suppose we then that *A* and *B.* being made Executors, the Testator was indebted to *A* twenty pounds, and *B.* was indebted to the Testator twenty pounds, how doe things stand presently upon death? First, it is cleer that the debt of *B.* to

And may
be granted
that he
should ac-
count before
the Ordina-
ry for it.

Yet it seems
Plowd. 186.
a. the Law
was taken
to be as fo-
104.8 & 4.

Though he
never admi-
nister.
21 E. 4. 3.
81. 11. H. 6.
38.

2 R. 3. 20.
per Starkey
& 22. per
Vausfor.

9 H. 5. 13
Left a de-
murrer in
trespasse by
all, against
the Execu-
tor, who was
trespassor.

B. to the Testator, stands in Law extinct, this making of him Executor, being a Release in Law. Therefore let Creditors take heede of making their Debtors Executors. And yet doubtlesse (me thinkes) such a debtor made Executor, should hold himself restrained in Conscience, from taking benefit thereof, if (the debt remitted) there shall want to satisfie either debt or Legacie of the Testator: and I doubt whether a Court of Conscience may not justly so order, the Testator being perhaps ignorant of this point in Law, that this debt should be released by making the debtor Executor. And what is spoken of making the debtor Executor, generally the same is to be understood of making any one of the debtors Executor, where there be many joint debtors: and so also where many Executors be made, and but one of them is debtor to the Testator, for they cannot sue without making him who is the debtor, also a plain-tiffe, which he cannot doe against him- self. The like Law touching Actions of trespassse or account: Yet of old, where one made his Bailiffe one of his Executors, together with *A* and *B.* who brought

brought an action of Account against the Bailiffe in their two names only; Justice *Herle* held the action well brought: This was in the beginning of King *Edward* the third his time; but the contrary hath been since resolved. Some also have held, that though in the life of this Executor who was a debtor, he could not be sued; yet after his death, the surviving Executors might sue his Executor: but that cannot be, as I take it, for that the debt was utterly extinct, by the making of him Executor, as if the Testator had released it to him; yea, though this Executor died before he did ever Administer or prove the Will. And like extinguishment of the debt, if the Creditor marry with one of the Executors of the debtor: yet was there an Action of debt maintained *temp. Edward 3.* by the Husband and Wife, against the Husband, and other Executors upon an Obligation by the Testator to the Wife, before her marriage. But if a debtor take Administration of the goods of his Creditor, this me thinks should not discharge him, but that his debt should stand as assets in his hand, because the intestine did no act to free him from the debt.

The

3 E. 3. 23

6 H. 4. 3

8 E. 4. 3

Choke

11 H. 7. 31

10 E. 4. 17

21 E. 4. 3. 62

Plow. comp. 36

Plow. com.

125. 1. 2. 3.

11 H. 4. 5.

83. 24.

34 E. 3. 1st

E. 83.

201. 31. 10

25. 1. 2. 3.

11. 2. 3. 4.

on of the

each from

101. 2. 3.

The Debtor or Creditor made Executor.

Plow. com.
185. By all
the Judges,
but *Brooke*
chief Just.
Plow. 185 b.
Where the
goods be of
more value,
which shall
bee so alter-
red?

See *Plow.*
com. 544. the
like of a Le-
gacy of 20
pound given
to the Exe-
cutor.

Or if the
goods as
mount in
all to no
more then
this debt.

THis making of the Debtee Execu-
tor, & so the party who both should
pay and be paid, the debt giveth him
clearly power to pay himself before any
other, if his debt be by Specialty or upon
Record. Nay, some have held, that so
much of the goods of the Testator shall be
altered in property out of the Executor,
as Executor, into him as Creditor;
but how that can be, I cannot see: For
whether shall it be satisfied out of the
Leases and Chattels real or personal, whe-
ther out of the Corne in the Barnes,
Cattel in the Fields, Plate or Household-
stuffs; this, till some election made by
this Debtee Executor, cannot be known,
nor shall be effected by any operation
of Law, preventing the Executors e-
lection, in taking his satisfaction,
where and how he will. For certainly,
as an Executor hath election to pay
which Creditor hee will first, so hath he
election to pay and satisfie himselfe, by
what part of the Testators goods he wil;
yet perhaps if there be ready mony in the
Executors hands, there shall be an altera-
tion

tion of the property of so much thereof as was owing by the Testator to the Executor. And if there come not to the hands of such Executor, sufficient to pay himself, he may have an Action of debt against the other Executors, or the Heir, as by some hath been conceived: Yet let it be well advised of, whether, if he doe Administer at all, and specially, if he pay himself any part, he have not thereby barred or disabled his suit for the Residue. But if he refuse to Administer at all, it were very unreasonable that he should not be able to sue the other Executors, for so a debtor might by subtilty make his Creditor an Executor with others, and take a course that his goods should come only into the hands of those others, so as the Creditor could not pay himself; and consequently, if he could not sue the other Executors, he should thus be stripped of his debt by a sleight. *Quere*, if he may bring the action in the name of the other Executors, only the Wil being proved in his name, as well as in the names of the rest; or whether the Action shall be brought in his name also and then he be severed at his owne prayer. But against the Heire there is none

See *Plow.*

185

13 H. 8. 15

11 H. 4. 83

12 H. 4. 21

20 E. 4. 17

21 E. 4. 3

Plow. 184. b.

& 185. b.

He is barred

for he can-

not appor-
tion his debt.

12 H. 4. 21
He may sue
the Heir if
the Heir be
bound, and
he have not
sufficient
goods as
Executor.

none to joyne with him, and him may be sue if he have not Administred as Executor; this admitted, that the Bond extend to the Heire, which without expresse words it doth not, though for the Executor it be otherwise.

Thus having considered of the State of things before and without any Will proved or other act done by Executors: we should now come to the point of proof; but two things, pertinent to it, are in Order precedent.

CHAP. III.

1. *What may be done by or to an Executor before proving of the Will.*

2. *Of Refusal, and the things incident thereunto.*

Before probate, what may be done by or to Executors.

AS to this it is clear, that before proving of a Will by the Executor, he may seize and take into his hands any of the goods of the Testator, yea enter into

into the house of the Heir (if not locked) so to doe, and to take the specialties of debts; and generally he may do all things which to the Office of an Executor pertaineth (except only bringing of Actions and Prosecution of Suits.) He may pay debts, receive debts, make acquittances &c releaser of debts due to the Testator, and take leases or acquittances of debts owing by the Testator: Yea, if before such proving, the day occur for payment, upon bond made by or to the Testator, payment must be made to or by this Executor, though no wil be proved, upon like pain of forfeiture, as if the Will were proved. Also an Executor may before *Probate*, sell or give away any of the goods or Chattels of the Testator. And whereas the assent of an Executor is necessary to the selling and Execution of a Legacy, as before hath been shewed; So as if one give me his white Horse, or black Cow, by Will, or any other well known thing, I cannot after his death take it, though I come where it is, but am punishable by action of trespassse, at the Executors suit, if he doe not assent; yet an Executor before the Will proved, may give his assent, and it will stand good. Yea, although

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he

9 E 4 f. 32
47-7. H. 4.
18. They
cannot sue
till they
have the
Will under
the seal of
the Ordina-
ry.

Wray. 23 El:

he die after any of these acts done, the Will being never proved by him, yet do these Acts so done, stand firm and good, as I take it. Yet (as I find) an Executor, making his Will, and dying before he had proved the Will of his Testator, his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were, after debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testator's goods, with the Will annexed, as by Doctor Drury was in the late Queen's time declared to be the Law, and course of the Court Spiritual, to which credit was given by the Judges of our Law, and the Court of Star-Chamber: for though the Book do not mention it to have been in Star-Chamber, it is elsewhere so reported: Yes an Executor, for goods of the Testator taken from him, or a trespass done upon the Estate-Land, or a Distraint, or Impounding of goods or Cattel, may maintaine, before the Will be proved, actions of Trespass, or Replevin, or Detinue, for these Actions arise upon the Executors owne possession.

Dy. in Pl.
com. 281.
Case of
Greistruak
& Fox.

But

But before the proving of a Will, an Executor cannot maintaine a suite or action of debt or the like. And the reason is, for that therein he must shew forth the Will proved, under the seale of the Ordinary. And so, as I take it, must it be, if he bring any Action for trespassse done, or goods taken in the Testators life time, so as the Testator himself was intituled to the Action, and it growes not upon the Executors possession. I find that an Executor granting the next avoidance of a Church which to him came from the Testator, the Grantee maintained a *Quare impedit*, without shewing forth the Wil: But the Executor himselfe might so have done, as of his own possession before the Will proved, and so without shewing it under the seal of the Spiritual Court, as well as Actions of Trespassse, or *Replevin*, for goods taken after the death of the Testator: yet in the Principal case of *Greybrook and Fox*, which was an Action of *Detinue* by the Executor, for goods taken or detained after the Testators death, the Plaintiffe did shew forth the Will proved. But that proves not any necessity thereof, or that if the Will had not beene

34. P. & M.
Dy. 135. a
Dy. in Plow.
com. 281. d.

Plow. com.
275 b.

proved, it could be no hurt to shew it forth; so upon his own contract for the Testators goods, as if the Executor sell Cattel, or other goods of the Testator before the Will proved, he may for the mony payable, maintain an action for debt before he have proved any Wil: and in this and the action of Trespasse, there is no necessity of naming him Executor. Also on the other side, an Executor may well enough be sued for debts of the Testator, before the Will be proved; for he may not by his own Act of delaying the *Probate* of the Wil, keepe off Suits, except hee will refuse in due manner, that so Administration being granted, there may be some body Suable by the Testators Creditors, for debts by him owing. And the usuall plea of the Defendant, to estrange himselfe from the Testament, is to say, that he neither is Executor, nor hath Administred as Executor. So as if he either be Executor *De jure*, or *De facto*, by his owne act of Administring, it sufficeth.

Of refusal to prove the Will, and therein of Administration, forecluding refusal.

NOW touching this other point, fit to be thought of, before we meddle with the *Probate*, viz. Refusal to prove; we will thereabout consider these several parts, viz. First, how, and in what manner refusal may or must be. Secondly, in what Cases, or in respect of what acts one named Executor hath lost or determined his election of refusal or acceptance. Thirdly, of what effect and operation the refusal is, what difference, where all the Executors refuse, and where but some or one of them. Fourthly, what relation it hath.

Now touching the first, the Ordinary, before committing Administration, where a Will is made, and Executors named, if he know of it, must send out Process against the Executors, to come in and prove it, and if they do not come, they are to bee excommunicate; but if they doe come, if they nor any of them will prove, by reason of such refusal, the Ordinary may commit Administration; perhaps also they may be appointed Executors at a time future, and not presenly.

3 H 7. 14.

9 Ed. 4. 47
3 Hen. 7. 14
Plow. com. 1
281.

E 3

Now

9 Ed. 4. 33
see Pl. 184

If Debtee
made Exe-
cutor, sue
the Ordina-
ry for the
debt; this
amounts to
a refusal of
the Execu-
torship.

M. 28 & 29
Eli. Inter
Brooker &
Carter, in ba.
com.

9 Ed. 4. 33
The Booke
calls him
Cardinall of
Canterbury.

Now refusal cannot be verbally, or by word, but it must be by some act entered or recorded in the Spiritual Court, and therefore must be done before some Judge Spiritual, and not before Neighbours in the Country; for that is not effectually. Yet Sir *Ralph Rowlett*, making the Lord Keeper *Bacon*, *Catlin* Chief Justice, and the Master of the Rolls, Executors; they wrote a Letter to the Ordinary, that they could not attend the Executorship, and therefore wished him to commit Administration, who did so; making every of their Refusals, to be recorded, and this was held good: So as a Lease being by that Will bequeathed to *Catlin*, and he after this refusal entring and assigning it to one, and the Administrator assigning it to another, it came in question between them, whether had best right, and judgement was given for the assignee of the Administrator against *Catlin* assignee; whereas, if the Refusal had been void, *Catlin* had continued Executor, and so his title had been better. For, in case the Ordinary himself be made Executor, there (saith the Booke) hee may refuse before his Commissary; and so was it there pleaded for the Arch-Bishop of

Can-

Canterbury, who was made Executor to
Sir William Oldhalle.

*What shall be such a meddling or Admini-
string by an Executor that he cannot re-
fuse after.*

AS to the second, where an Executor
hath Administred, he cannot af-
terwards refuse, because he hath already
accepted of the Executorship, and so de-
termined his election: at least the Or-
dinary ought not to accept of such refu-
sal, but should compell him to take upon
him the Executorship, as the Law was
taken both in the time of *Ed. 4.* and of
Queen Elizabeth: Yet if the Ordinary
do admit one to refuse, notwithstanding
that he have Administred: this stand-
deth good, as it seemeth, conceived by
the Judges in the time of *Hen. 6.* for
there the Executor commanded one to
take goods of the Testator, out of the
hands of *I. S.* who did accordingly; and
afterward the Executor refused before
the Ordinary, and Administration was
committed to the said *I. S.* who brought
an Action of Trespasse against the party
so taking the goods from him, and there

*Ed. 4. 47.
selling land
as Executor
is Admin.
Dyer in case
of Gresham
& Fox. PL.
com. 28a. b.
Pas. 7. Eli.
36. Hen. 6.
f. 7. 8*

the refusal and committing Administration were admitted to be good: so perhaps *Factum valet quod fieri non debuit*. And it well may be, that the Ordinary did not know of the Executors such intermeddling at the time when he did admit of his refusal. After Refusal and Administration committed, the Executor cannot go back to prove the Will, and assume the Executorship: but if only upon the Executors making default to come in upon Proceſſe to prove the Will, the Administration be committed, here the Executor may yet at any time after come and prove the Will, and so undo the Administration: as was in the late Queens time resolved betwene *Bale* and *Baxter*.

Mich. 27
28 Eliz.

Baxter Case
in com. ban.

But what if after refusal, it shall appear to the Ordinary, that the Executor had administered before his refusal, so as had it been then known, the Ordinary should not have admitted him to refuse; Whether now may he revoke his Administration (for it is revokeable) and inforce the Executor to proceed to proving of the Will? And surely me thinks he may, for that the Executor by Administring had determined his election, and

and accepted the office of Executorship; now he cannot both accept and refuse. Besides, we know, that Creditors may maintain their Suits against him, having once Administred; the Common Plea to free himself, and shew that he is not the party suable for the Testators debt, being, that he neither is Executor, nor ever did Administer as Executor; wherefore he having administred, it will be found against him. Now it is not Congruous, that in the Spiritual Court there should be no Executor, and yet in the Courts of *Westminster* there should be an Executor. But since this point of Administring is so materiall to the point of being admitted, or not admitted to refuse, we will here consider in this place briefly what shal be said to be an Administration by an Executor, determining his election, and disabling his refusal, and what not. 1. Some wil perhaps conceive, that the act of the Executor in the forementioned Case, where he only commanded *I S* to take goods of the Testators out of a strangers hands, was no Administration: & it is true, that in that Book it is passed in silence, & not expressly said to be an administration.

But the Lord *Dyer* in the Case of *Greisbrooke* and *Fox*, speaking of that Case

A being Executor did Administer, and yet would not prove the Will. *B.* tooke Administration, and being sued for debt, did plead the matter *supra*, and was held a good plea; and it was found for him before. Just. *Darbo-ridge* ad Ox. in a stat. 2. *Carol. reg.* 36 H. 6. 7.

Case, saith expressly, that the Ordinary might there have rejected the Executors refusal; for saith he, when the Executor had once intermeddled, he should not have been suffered to refuse; so as hee doth clearly admit, that to have been an Administration. And elsewhere it is held, that if an Executor take goods of the Testator, and convert them to his own use, this is an Administration; yea if he do but take them into his hands, say some, without converting of them: If the wife take more apparel of her own then is necessary, this is an Administration, as the Book admits; but if by the assent or delivery of the Executor, it is not. More clearly, if one do either pay debts of the Testator, or receive debts, or make acquittances for them, or demand the Testators debts as Executor; or give away goods which were the Testators, or deliver money of the Testators for Fees about proving the Will: all these be full and clear Administrations as Executor. But saith *Fitzherb.* if hee only lay out his own money for Fees, this is no Administration; so saith *Frowick*, if he pay debts with his own money; and if he do it about the Funerals. But some dif-

20. *Ed.* 4.
17. & 18.
45.
21. *Ed.* 4.
21. *H.* 6. 19.
20. 33. *H.* 6.
31. 8.
1. *Ed.* 1. 166.
13. *Ed.* 3.
Exec. 91.
3. 4. *Ma.* Dy.
1. 35. 36. *H.*
8. 7. 8. 20. *H.*
7. *Kelp.* 63.
21. *Ed.* 4. 5.
20. *H.* 7. f. 5.
4.

difference may be between acts done by one named Executor, and by a stranger; viz. to make him an Executor of his own wrong, whereof we shall speak after, not in this place. If one being sued as Executor take it upon him, and plead in Bar as an Executor, this is an Administration. 9 Ed. 4. 12
13. 33. H. 6
31 a.

Of the force and effect of refusal.

AS to the third Point, viz. the force or effect of Refusal. First, it is clear that if there be but one Executor, and he doe refuse, or being many, if they doe all refuse, then is the party dead Intestate, and Administration is to be committed with the Will annexed, as is before said; nor can any after meddle as Executors. But in case there be divers Executors, viz. *A B* and *C*, and *A* onely refuseth, and the Will is proved by the others, there *A* continueth Executor, notwithstanding his refusal, so as he still may release debts of the Testator, and debts owing by the Testator may be released to him; yea, if Suit be to be had by or against the Executors, it shall not be in the name of *B* and *C* only; but *A* also must be named as a Plaintiffe or Defendant, Cook 1. 5. f.
28. Cont. 18.
B. 2. Bre. 8
37
22 Ed. 3. 19
15. Ed. 3
Exec. 8.
41 Ed. 3. f.
22. 21 Ed.
4 fol. 24.

pendant, else the Action may be overthrown. For the Will being proved, all the Executors therein named, stand and continue Executors, notwithstanding any of their refusal; as it was resolved in the latter end of the Late Queens time, according to divers former resolutions. And therefore this Executor which hath refused, may afterwards Administer at his pleasure, and intermeddle with the goods as well as the others: yet saith Brooke Chief Justice, after the death of his Companion he cannot so doe, but then the Executor of him who proved, is only to Administer, *Quod non est Lex*. There may be some difference between Suits by Executors, and Suits against Executors; for when they themselves sue, they being privy to the Will, and having the Custody of it, must bring their Action in the name of all the Executors, according to the Will; but he that is to bring an Action against them, need not perhaps take notice of more Executors, than those that have proved the Will, or otherwise do Administer: for it is no good plea for themselves in an Action against them, to say there is another Executor, without saying also that he hath Admini-

43 El. Co. 9.
fol. 36, 37.

4 & 5 Ph.
& Ma. Dy.
169 c. 6.
contra 21
E. 4. 23, 24

Administred, as it seemeth by divers Books. Nay one book in the time of *Hen.8.* goeth further, viz. that if the suit be brought against all, yet one of them not intermedling with the proving of the Will, may plead that he was never Executor, nor Administred as Executor. By this it should seem, that Executors refusing (I mean all of them, so as no Will is proved) they in an Action against them, may say, 33 H. 4. 38
a Co. 9. 37. 6
32 Hen. 6
25. 27 H
8. 11, per totam curiam. that they were never Executors; but me thinks they should not so plead, but shew the special matter, as was done in the time of *Edward* the fourth.

As for relation, I wil forbear to speak, till I come to proving, for that *Probate*, 9 Ed. 4. 33
Co. 9 f. 36 and Refusal stand in the same state, as touching Relation.

CHAP. IV.

Of proving Wills.

NOW let us see touching the *Probate* of Wils. What is considerable; and therein of these three or four parts;

1. *Where and before whom, and how the prooffe must be.*

2. *What*

2. *What shall be Bona notabilia, to intitle to Probate.*
3. *What force or validity, either a right or erroneous Probate hath.*
4. *What relation either Probate or Refusal hath.*

As touching the first point, viz. How, and where, and before whom Wills are to be proved, briefly thus;

The proving is in the Spiritual Court: yet in some Mannors by Prescription, Wills are to be proved before the Steward, though no Lands thereby passe, as appears by divers Books: and in the Manor of *Mansfield* is this Prescription; and in others, whereof *Tremaile* was Steward in King *Richard* the third his time, as he declared: and the like I may tell of my own knowledge, touching the Manors of *Cowly* and *Caversham* in the County of *Oxford*, where I have kept the Courts for the Lord Vicount *Wallingford*, and found it in present and frequent use. And it is said by the Judges, in the time of King *Henry* 7. that this proving of Wills in the Court Spiritual, is not ancient, but of later time. Yea, it is acknowledged by *Linwood* the Dean of the Archies, that it pertains not to the Spiritu-

2 R. 3. Fitzb.

4 Co. lib. 9

Jo. 43.

21 H. 7. 12

Spiritual Court of Common right; nor is so in use in other Kingdomes. The reason why the Law of *England* hath herein given way to the Ordinary, and Court Spiritual, is said by *Walsb* in *Griekbrook* and *Foxes* Case, to be the piety and integrity which is presumed to be in those of that Function, having charge of soules. Indeed they are, as it seems to me, Executors of the new Testament, or last Will and Testament of Jesus Christ; whereby great Legacies and Gifts are given to men, and by Pastors to be dispensed and distributed: of which distributors, it is required, as *St. Paul* saith, *1 Cor. 4.2.* *That they be found Faithful.* And happy are they, who with him can plead *Plene Administravit*, viz. that they have fully Administred, as he did; much depending thereupon, viz. Gods honour, the blessing, prosperity, and safety of the Country, the Piety, Justice, Conscience, Contentation and Salvation of men. As for Wills proved in *London* and *Oxford*, before the Major, that is only in respect of the Burgages within those places devisable; but they were to bee proved also before the Ordinaries, in respect of the goods; and there only where no lands bequeathed. *The*

Plew. cam.

379.

1 Cor. 4.2.

Acts 20.27

Vide fol.
proxim. If
Bona Notabilia
both in
Canterbury
and York,

The proving then is to be before the Ordinary, General, Particular or Special. by General I mean the *Metropolitan* or Arch-Bishop, before whom it is to be proved; in case the Testator have goods valuable, called *bona Notabilia*, in divers Diocesses, whereof he is Superior.

Of Bona Notabilia.

WHat shall be said to be *bona notabilia*, is considerable, for there about hath been much diversity of opinion: Some holding, that they must be of forty shillings value; some five pound, some ten pound; yea some, that the value of a penny sufficeth to draw it to the Arch-Bishop, from the particular Bishop. But that difference of opinion I conceive to be now cleared, by a Canon made in the first year of K. Charles his Reign, at a Convocation then held; whereby it is established, that five pound shall be the sum or value of *bona Notabilia*; yet therein is this *Proviso*, that where by Composition or Custome in any Diocesses, *bona Notabilia* are rated at any greater sum, the same shall continue not altered. It is likewise thereby provided, that if any man dye in *Itinere*, viz. in his journey

journey or travel, the goods which hee then hath about him shall not cause that Administration shall be committed, or the Will proved before the *Metropolitani*.

Having considered of the value: now another Point observable, is, what things shall be said to be *bona Notabilia*. And as to that, debts owing to the Testator, are *bona Notabilia*, as well as goods in possession, their value being answerable; yet I think, if the *Penal* sum of the Bond be but five pound for payment of a lesse summe, although the Bond be forfeited; yet in the Spiritual Court, where respect to Conscience suppresseth the favouring of Executors; this will not be taken to be *bona Notabilia*, viz. of five pound value, although in Law, the whole *penal* summe be a duty. But if the debt be five pound or more, though it be desperate or due from the King, against whom no Suit can be, but only by petition, yet this will stand for, and as *bona Notabilia*, as I take it, in the Court Spiritual, though thereabout I can but conjecture, since the Rules of our Law determine it not. And this Point touching the Kings being debtor, I finde debated

21 Eliz.

Goods con-
siderable, or
conspicuous

Hil. 19 Eliz.
M. Com.
Da. Vire 13
& 14 Eliz.
Dy. 305.

ted in the late Queenes time, but not resolved, so farre as I finde; but there *Popham* at the bar urged, that no debt should be *Bona Notabilia*; and if it should, yet not such, for which no remedy by suite, as in that Case, the Queen being debtor. Yet a further Question Locall, is touching these debts, or things in Action, in what place or Diocesse they shall be said to be, as *Bona Notabilia*, viz. whether in the place where the debtors bee, or where the Obligation, or other specialties be. And as to this the Law hath been taken, that because the persons of the debtors be moveable, passant, and transitory; therefore these debts shall be said to be, and to make *bona Notabilia* where the Bonds or other specialties be, and not where the debtors inhabit and dwel: and so was it not long since conceived by Justice *Walmsey*, and Justice *Beaumont* in one *Pretimans* Case, no other contradicting it. Herein therefore many are mistaken, who only in respect that the persons of the debtors do dwel in forraine Diocesses, other then the places of the death of the Testator, or where his other goods were, do take Administration in the

the prerogative Court, though the Specialties remained where the party died, or his goods residue, were. But in case the debts be only by Contract without Specialty, then indeed they are to be esteemed *Bona Notabilia* there, and in that place where the debtor is, as the said Judges well conceived the difference. But in case Land be given to Executors for payment of Debts or Legacies, this shall not be *Bona Notabilia*, as I take it, though it be Assets.

Of the validity and invalidity of Probates.

AS to the third Point, we will first see of what validity an erroneous proof is, and thereabout we shall find this difference: admitting that one hath not *Bona Notabilia* in divers Diocesses, so as of right, the proving of the Will appertaineth not to the *Metropolitan*, and yet the Will is proved before him; this is not meerly void, but stands in force till it be reversed by some sentence upon appeal, as was resolved between *Year* and *Jeoffries*, in the late *Qu.* time. But on the other side, in Case one have *Bona Notabilia* in divers Diocesses

22 Eliz.

F 2

or,

or a peculiar and a Diocesse, and yet the Will is proved before the particular Bishop, within whose Diocesse part of the goods are; this is meerly and utterly void, without any reversal. So also of proving in some peculiar. And in Case one have *bona Notabilia*, both in the Diocess of *Canterbury*, and in the Diocess of *Tork*; the Will must be proved either before both *Metropolitans*, if within each of their jurisdictions there be *bona Notabilia* in divers Diocesses; or else, as I take it, if there so be not in any of the places, then before the particular Bishops in those several Diocesses where the goods are. Or if within the one jurisdiction *Metropolitan* the Testator had goods in divers Diocesses, and in the other but in one Diocesse; then in the one place is the Will to be proved before the Arch-bishop, and in the other place before the particular Bishop, as I conceive. And so also of peculiar jurisdictions. And in some places Arch-Deacons have peculiar, or jurisdiction ordinary, and power to take *Probates* of Wills and grant Administrations. But where any like error or misproving is in these respects, it is cause of reversal or of nullity,

nullity, according to the former difference; so also, if there be falshood in the proof, were it *Communi forma*, that is, without witnesses, or by examination of witnesses, yet may it in the Spirituall Court be undone; if either disproof can be made, or proof of revocation of that Will once made, or of the making of a latter.

Now, yet admitting the Will true and right, and also rightly proved; let us yet see the force and strength of the proof, or Will so proved. It being under the Seal of the Ordinary, cannot be denied, saith one Book, to wit, whether this shewed forth, be a Will proved or not, no, though the proof be but indorsed on the back, viz. that it is so proved, saith the Book: but notwithstanding the Defendant so sued, may deny that the Plaintiff is Executor, as not being concluded nor estopped by the *Probate* so to say. And the reason is, because the Seal of the Ordinary is but matter in fact, and not matter of Record; nor are the sentences of divorce, and the like, in the Spirituall Court, Judgments, or matters of Record; as hath been often held,;

9 Ed. 4. 47
22 Ed. 4. 50
22 H. 6. 52

Plow. com.
282. 44 Ed.
3. 32. 19
Ass. p. 2.

Of the Relation of Probate and Refusal.

Plow. com.
281. d. 283

12 H. 6. 23
2. 9. B. 433
47. Nos. in
make good
a Release
made before
Co. lib. 5. 28.

AS for this last Point, both the Proving and the Refusal shall have Relation to the death of the Testator; as I take it, to divers purposes. So as to the proving, saith the Lord *Dyer* expressly and confidently in *Greisbrook* and *Foxes* case; and the resolution also of the Case proves it. For there Administration being committed before any Will proved or notified to the Ordinary, as it should seem, the Administrator sold some of the goods to *I S.* and after the Executors (proving the Will) brought an Action of *Detinue* for those goods against *I S.* who pleaded this Administration and sale, and thereupon the Executor demurred, and Judgment was given for him, as having by the proving of the Will, disproved the Administration *ab initio*: but it is true, that judgment was given only by two Judges; one being absent, and the other dissenting in opinion; yet I think it was right, and according to Law; and that Refusal shall have the like relation; else could not the Administration relate to the death of the Intestate, as it

it doth to some purposes, expressed in divers books, viz. to have an Action of Trespasse for goods taken before Administration committed, and to have a rent growing payable in that mean time, &c.

39 H. 6.8
2 Ma. Dy.
110.

What Fees to be paid upon Probate, or for Copies of Wills, or Inventories.

Per Stat. 21. Hen. 8. Cap. 5.

1. Where the goods amount not to above five pound, only six pence to the Scribe.
2. Where they be above five pound, but under forty pound, two s. six d. to the BB. twelve pence to the Scribe.
3. Where above forty pound, to be taken but two s. six d. to the BB. two s. six d. to the Scribe, or 1 d. for each ten lines of ten inches long, at the Scribes choice.

THese Summes are to satisfie, both for Proving, Registring, Sealing, Writing, Praising, making of Inventories, giving Acquittances, Fines, and all other things concerning the same.

Where Land is given to be sold, neither

the money raised, nor the profits thereof shall be accounted as any of the Testators goods or chattels, saith the Statute.

Note, that the Will is to be brought with wax thereunto ready to be sealed, and proof to be made of the Will, according to common Custome.

For making the Inventory, the Executor is to take, or call to him two Creditors or Legatees of the Testator, and do it in their presence, or in their absence or refusal, two honest persons being the next of his kinne, or in their default, two other honest persons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remain with the Executor.

The Executor is to make oath for the truth of it.

For a Copy desired by any, either of a Will or Inventory, no more is to be paid than before is allowed for the Registering, with the like election to the Scribe, or Register, as is abovesaid.

Master Swinhorne saith, that an Executor is to swear, and if it should be thought fit, to be bound to make a true account when he shall be thereunto lawfully

fully called by the Ordinary: Of this account see in page 274. And of accounting, some Books of the Common Law make mention, as 13 *Edw.* the third *Fitzh. Exec.* 91. Where *Trem* saith, that of a thing in action, no account shal be before the Ordinary; but *Parn* seemes of a contrary opinion. And elsewhere it is said, that where a debtor is made Executor to the Debtee, he shall yea account before the Ordinary for this debt; yea as of money in possession, saith one, which others denied.

An Executor by wrong shal be drawn to account before the Ordinary, saith *Moyle* Justice. But saith *S. German*, he may not force any to account against the Order of the Common Law; (not shewing what that is.) And *comp. Edw.* the 4. it is said, at least by the Reporter, that after the Will proved, the Ordinary hath no more to do; *quod non credo*.

Also of the oath of an Executor, divers bookes tell; but not to such purpose as *Swinsb.* but truly to performe the Will.

See also 11 B.3 cap. 11. An^r Administrator shal account as an Executor. *Fitzh.* Ex. 91. & 837. vii. 18 E. 2. iii. Brief. 48 E. 3. 14. 13. Of a duty resting in account, it is said the Legatee shall have remedie by account in the Spiritual Court. 18 Ed. 4. f. 3. *Moyle*. 4 H. 7. 15 per Wood. 9 Ed. 4. 47 *Doff. & Stu.* 78 b. 21 H. 4. 22 *Plow. com.* 544. 4 H. 7. 15 *Kely. rep.* 64. a.

CHAP. V.

What things shall come unto Executors, and be Assets in their hands, and what not.

THe things which shal come to Executors, are of great multiplicity, and would make a large and confused heap, if tied together in one bundle or lumpe. I will therefore divide and sort them out in parts, after the best manner I can. First, we wil divide them into things possessory, or actually in the Testator, and things in action, or not actually in the Testator. Secondly, the possessory into chattels, real and personal, or (as some lesse properly express it) moveable and immoveable.

Of Chattels real possessorie.

THese may be divided into two kinds, *viz.* living, and not living; the living are not many and various, 1. The wardship of the body of another, be it by reason of a tenure of the present owner, or by Assignment from the King, or other Lord of whom the tenure was, is

a Chattel real, not personal, though it be an interest in the person of another; but it is in respect of a reversion of Land, or other hereditament, and is for yeares, viz. during the minority, or till marriage had, and so is real. Next, a Villen for yeares (as by Grant for a terme from him that had the Inheritance) is a Chattel real. As for an Apprentice, for yeares, it is by Custome, as I take it, that he goeth, or is derived to Executors: but for reason after shewed, I thinke this Interest be not in the reality, but in the personality rather. So of a debtor in Execution for debt, the interest in him, or perhaps more properly in his liberty, is not, as I conceive (for reasons which after I shall expresse) a real, but a personal Chattel. The like Law of a Prisoner taken in the Warres. As for Fishes in a Pond, Conies in a Warren, Deere in a Parke, Pigeons in a Dove-house, where the Testator had the Inheritance, or but for life, in the Pond, Warren, Parke, & Dove-house, they are not Chattels at all, nor to goe to the Executors, but to the Heire with the Inheritance. If the Testator were but a Termier, they are to goe to the Executor, but as accessory Chattels, following

lowing the state of their principal, viz. the Warren, Park, Dove-house, Pond, &c. The real Chattels, not living, are either in Houses or Lands most usually, and that three wayes. First, by Lease for years. Secondly, by Wardship of Lands held by Knights-Service. Thirdly, by extent upon Judgments, Statutes, or Recognizances; or in things issuing out of Houses or Lands, as Rents, Commons, Estovers, or such like. But where an Inheritor reserves a Rent upon a Lease for years, this shall not goe to the Executor, but to the Heire, with the Reversion; other then Arrerages of it behind at the death of the Testator. Also Commons, Corodies for years, Advowsons, Tythes, Hairs, Markets, Profits of Leets, and such like, which the Testator had for years, all which may accrue any of these wayes, at the first, are Chattels Real. Yea, one simple presentation to a Church, upon the next avoidance, is a Reall, and not Personal Chattel; because it come to bee void, and what then it is, we shall after shew. And the title accrued to the Crowne, upon attinder of felony, where the party hold not of the King, viz. the *Annum, dcm*

& *Vassum*, that is, power not onely to take the profits for a year, but to waste and demolish Houses, and to extirpare and eradicate Trees and Woods, is but a Chattel, and therefore though granted to one and his Heires by the King, yet shall goe to the Executor, and not to the Heire.

Temp. H. 1.
Assize 124
Finn.

Some doubfull, or lesse cleer Cases, touching Chattels Reall.

First where we speak of Wardship, it is not to be understood of Wardship by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian, who now after the death of the first Guardian, shall be next of Kinne, if the Ward continue under fourteen years old, else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assignes, this is no Chattel, nor shall goe to the Executor, nor to the Heire, but to him, who first enters, and claims it as an Occupant, if no Assignment be in the life of the Lessee made: Contrarily, of a Lease for many years, if three, or more or lesse, so long live, this is a Chattel, and shall go to the Executor. So an extent upon

37 Ass. p
11.

4.E. 3. Aff.
166. Bro.
Chas. 15.

upon a Statute, yet it is delivered to the party as a Freehold, viz. *Ut liberum tenementum*; but that onely makes it to be *quasi liberum tenementum*, as to the maintaining of an Affize, if wrongfully put out. Where one is seised in the right of his Wife, of Land, or other Hereditament, and is attainted of treason or felony, the profit thereof accrued unto the Crowne, is but a Chattel, and though the King grant it to one and his Heires, yet it shall goe to his Executors. And if one, having a Lease for many yeares, viz. 100. 500. or more, or lesse, and doth devise and bequeath the same to *A*, and the Heires males of his body, and for want of such issue, to *B* and the Heires males of his body, and dyeth, having issue a Sonne, the terme shall not goe to his Sonne, but to his Executor or Administrator, for it cannot be made a matter of Inheritance; so if *A* had died without issue male, the terme should not have gone or remained to *B*, but to the Executor or Administrator of *A*, as was lately adjudged in the Exchequer, betweene Sir Robert Lewknor, and Mistris Hammond. So of an advowson, or any other hereditament, granted or devised to one
and

and his Heires for 100. yeares; or if such a term be grant a Rent out of the Land to A and his Heires, or the Heires, or Heires, males of his body, yet shall the same goe to the Executor, and not to any Heir; for it being derived out of a Chattel cannot be any Freehold or Inheritance, but is it self a meere Chattel. *Partus sequitur ventrem.*

39. E. 3. 37.
So if a man be
if granted
for life, it is
but a chat-
tel, *Plow.*
com. 524.

Of Chattels Personal.

PERSONAL Chattels, or goods moveable, are also in like manner to be divided into quicke or dead. The quicke are Chattel of all kinds, as Seepe, Horses, Kine, Bullocks, Swine, Goates, Geese, Duckes, Poultry, &c. There may be also in living Creatures reasonable an Interest as in a Chattel personal, as in the person of a man taken in execution for debt. And this I hold to be in nature, not a Real, but a Personal Chattel (as before was touched;) for that debt is the root of it, and the body is but a pledge or gage, dischargeable instantly upon payment, release, or other discharge of the debt. Like Law of a Prisoner taken in the Wars; for thereof and there-

No. 11. b. r.
28. Reg. v.
11. f. 102
There is
mentioned
that the
prisoner
was to have
150 l. for
his ransom.
Bro. 20. ca.
295 & sis.
Property. 38

1. H. 6. c. 5.

therein, as in a Chattel, hath the party a legal interest: as appears by a Writ of Trespasse in that Register, for taking away a Prisoner, viz. *Quare quendam Scottum Prisonarium suum cepit, &c.* And note lately, viz. In the time of King Hen. the 8. the King himself, upon the winning of Bullen bought divers Prisoners of his Subjects. And by a Statute in the beginning of Hen. the 6. his time, this Interest in a Prisoner is mentioned as valuable, and coming from one King unto another; therefore doubtlesse shall goe from Testator to Executor by death, and not be enfranchised or freed thereby. The interest which one hath in an Apprentice, I take to be rather Personall than Reall, though for years, because not springing out of any Reall roote, as Wardship, and Villenage doe; but out of a meer contract. As for a Servant whose Master is dead, doubtlesse hee is legally discharged, and is not Servant either to Heire or Executor; but meets and honest it is, that one of them continue him in service till a fit time of providing for him a new Master; and fit for him, not to depart suddenly.

Now for things personal without life;
These

These are evident, viz. all Household-stuffe, Implements and Utensils, Money, Plate, Jewels, Corn, Pulse, Hay, Wood felled and severed from the ground, Wares, Merchandize, Carts, Plows, Coaches, Saddles, and such like moveable things.

More doubtful Cases touching things personal

First touching things living: If the Testator had any tame Pigeons, or Deer, or Conies, or Fielants, or Partridges, these all as well as Chickens shall go to the Executors; so though not tame, if they were taken and kept alive in any Roome, Cage, or like Receptacle, as Fielants and Partridges often be, so fish in a Trunk, as also young Pigeons, though not tame, being in the Dovehouse, not able to flye out; yet their Dams, the old ones, shall go to the Heir with the Dovehouse. And if the Testator had any reclaimed Hawkes, they also as Chatrels Personal shall goe to the Executor, because they are things commonly vendible. And whereas Hounds, Greyhounds and Spaniels, bee not so commonly bought and sold, nor so anciently have been, yet are they now growne to bee

10 E. 4. 14
15. Come
of wild ones
22 H. 7
Ke'w. rep.
f. 88. 118
Co. 1. 1. 11 f.
50. 18. H
8. 2

10 E. 4. 14
15 & 18
E. 4. 8
E. 4. 8
So of young
Hawkes in
the nest. It
is felony to
steal these
Ergo they
be goods.

So an Hun-
ters horae,
a Falkoners
Jewer.
Hares,
Dagr, Fe-
sants, Par-
tridges, wild
Ducks &c.
are good
meat.

a Marchandize, and why not? for al-
though they be for the most part but
things of pleasure, that hindereth not but
they may be valuable, as well as Instru-
ments of Musick, both tending to delight
and exhilarate the spirits; a cry of Hounds
hath to my sense more spirit and vivacity
then any other Musick. Adde hereto
that there may be some profit and advan-
tage gotten by them, both *quoad adep-
tionem boni, & ademptionem mali*, the get-
ting of some good food, and the preserv-
ing of others, as Lambes, Conies, Fish,
Poultry, by killing Foxes, wild Cats, and
others which destroy them. And wee
know that money is recoverable in dam-
ages for taking away such, or a Mastiff,
serving to keep an house. So of Ferrets
to catch Conies, &c. Therefore they are
valuable. But it may perhaps be obje-
cted, that none of these above are Cattel,
and therefore not replevisable, conse-
quently no property in them; for when
more then one living Cattel is distrain-
ed, the *replevin* is to be by the name of
Averis, signifying Cattel. For answer,
not to insist that one may have property
in divers things, whereof no *replevin* lieth,
as Corn or Hey, nor in Sacks nor Carts,
mony

mony not shut in bag, nor box &c. I further say, that even the word *Averia* may be applyed to these, for so I find to Hens & Capons in the book of Entries, viz. in the writ of *Curia Claudenda*, where the Plaintiffe complains of the defendants not making his *Mounds, per quod averia ipsius A. viz. Capones, Gallina & alia Averia ipsius A.* that is, whereby his Cattel, viz. Capons and Hens, and other his Cattel came into the Plaintiff's house and Garden to his damage, &c. And both *Newport* and *Newgate* hold that a writ of *replevin* lieth of such things; though *Brendenel* were of contrary opinion, yet he Fo. 142 Hen. 2. f. 3 also held an action of *Trespas* maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life, and first to those abroad in the Fields. Put the case that a man dies in *July* (before Harvest I mean) seized for life or in Fee, or Tail, in his own right or his wives, or estated for yeares of Land, in the right of his Wife, being sowne with Corne or any manner of Grain, the common saying is, *Quicquid plantatur solo, solo cedit*; yet this shall goe to the Executor of the husband, and not to the Wife or Heir,

Rootes of
Carrots,
Parfneps,
Land sowne
whereon is
ripe Corne.

For he was
Tenant for
life in effect

who shall have the Land, but Hay growing, viz. Grasse ready to be cut, Apples, Pears, and other fruit upon the Trees shall go to the Wife; as also if they had been upon a mans owne Land of Inheritance, they should go to the Heire, though the Corn should go to the Executor. The reason of difference is, because this latter comes not meerly from the soil, without the industry and manurance of man as the other doe; and I take Hops, though not sowne, if planted, and Saffron, and Hemp, because sowne, to pertain as Corne to the Executor. All those yet shall passe to one, to whom the Land is sold or conveyed, if not excepted, though never so neer reaping, selling or gathering. But what if the Wife had the Lease for years as Executor to some former Husband or other friend, and the Husband after sowing dies, who then shall have the Corn? Certainly the Corn shall go to the Executor of the last Husband, at least so much as is more then the yeers value of the Land, or the making it up by addition of other things, for the value is to be Assets for payment of debts & Legacies. Put the case again, that the Husband and Wife were joint-tenants of the land,

and

and then the very Corn growing shal survive to her, together with the Land, and though the Husband sowed it, yet shall it not go to his Executor. Being in consideration of things growing on the ground, let us not forget to think of Trees sold by *I S* seized of the Inheritance of the Land to *ID* who dieth before selling, this Interest is a Chattel which shal go to the Executor, and not to the Heir of *ID*. but some colour may be, that these, because fixed to the soile and Free-hold are real Chattels, as the Interest in Land is, and not personal: So also of trees excepted by him who selleth the Inheritance of the Land; but in both cases I conceive this Interest to be personal, and not real; for that, as it is a propriety of Chattel in the Vendee, or Vendor with exception, it stands in consideration severed and abstracted from the soile or ground where the Trees grow, though the Trees be not actually severed by the Axe from their mother Earth. But if the Lessor for yeares or life except the Trees, these continue parcell of the Freehold and Inheritance. And after Corne reaped, and before the Tythe set out, the Inheritor of the Tythe dying, I think the

The wife
also shall
have convenient
apparel.

33 H. 6. 31.
2 Eliz. Dy-

Col. 11 f. 48

Executor, and not the Heire, shall have the Tithe after set out.

Of Houses
or things
about the
House.

42 E. 3. 6

Now let us come home to the Testators house, and see in and about it; some doubt, what pertains to the Heir, and what to the Executor. Question hath been of old, and of late, touching Coppers, Leads, Furnaces, Fats for Dyers or Brewers, Pales, Rayles, Glass in Windows, Tables, Dormants, Wainscots, Doors, Locks, Keyes, and such like, to whom these should goe? whether to the Heire or Executors? And in the latter end of *Henry* the 7. his time, an Executor taking a Furnace which was set in the middle of a house, and not fixed to any Wall, the Heire brought an Action of Trespasse against him for so doing, and it was adjudged for the Heir, viz. that this was to go as part of the Free-hold and Inheritance to the Heire; and long before in *Edward* the third his time, it was debated whether it were waste in a Lessee to remove or take away a Furnace or not: but I finde no opinion delivered by the Judges: But in the late Queens time, Justice *Walmesly* said, that the Lord Dyers opinion was, that where the Furnace is not fixed to the Wall,

41 H. 7. 126

42 E. 3. 128

Wall, the Lessee might within his terme take it away. Contrarily, if it were fixed to the Wal, for then it strengtbneth the house. And yet notwithstanding it might be in the one case so removed by the Lessee, yet is it not there, as he said, a Chattell personall or moveable, so as it is attachable; and there the case being that a Clothier being a Termer of an house, had fixed a Copper to the Wall with Loomes and pricks necessary for his Occupation, a Judgement being had against him, the Sheriffe delivered the Copper in Execution as a Chattel, and after the Lessee tooke it up, and it was taken from him by vertue of the Execution; whereupon hee brought an Action of Trespasse, and by all the Judges, the action was maintainable. And whereas it was found by the Jury, that by the Custom of *Kent*, the Lessee might remove such a Copper; Justice *Beaumont* said, that without any Custome, a Lessee might so do at any time during his terme. But it is to be noted in the said case, that the furnace was by it self delivered as a moveable Chattel, and not as part of the house, for that was not medled withall, nor at all delivered in extent (as

H 37 Eliz.
Austins
case.

in the Case between *Miles* and *Prat*, where both house and Copper were delivered upon a Statute the house belike being held upon such a rack rent, as that the party did not desire to have it, for hee might have had the whole being a Chat- tel, and so have used the Copper during the terme. And as touching all other fixed things, the Law was taken in the said case in *Hen.* the 7 his time, to be all one, as in the case of the Furnace, viz. that they should go to the Heir, save only that for Glasse in the windows, *Pollard* said it was otherwise, viz. that that should goe to the Executors, which none there denied. But since, in the late Queens time it was otherwise resolved touching glasse, that it should not go to the Executors, and the like was there said touching Wain- scots, and so also by the Lord *Anderson* in the said case of *Austin*. And touching Posts fixed, for that they be parcel of the Freehold, so also of Millstones, Anyills, Doors, Keyes, Windowes, none of these be Chattels, but parcel of the Freehold, or thereto pertaining, therefore not the Executors.

Co. lib. 4. f.
93. 94.

Things in
Gardens.

Now to come to Gardens also: whereas I before laid down a difference
4
betwixt

betwixt things sowed, or not arising from the Earth, without manuring, and such as grow of themselves; It will thence be concluded that the rootes of Carrets, Parsneps, Turneps, Skerrits, and such like, coming and arising from yearly sowing, must go to the Executor, and not to the Heir; the case being so, that the Gardner and Sower had the Inheritance of the Garden or Soile: now though in most places this can rarely be a question of value, yet about *London*, and some great Towns it may, and therefore not unworthy of a line or two, a thought or two, the rather for that the reason of this case may give light touching right in other Cases. And in my opinion, these (notwithstanding there is a sowing and manurance to generate them, and cause their being) shal go to the Heire and not to the Executor: my reason is, for that the thing of profit is the root which is hidden in the ground, and I hold it no reason, nor agreeable to Law, that the Executor should dig and break the soil and ground to search for her entrailles; he is to content himself with that which is above ground, as Melons of all kinds, and the like, whose fruit is above the ground: but

as

as for Artichokes, though the fruit be above the ground, yet I think they have not such yearly setting, or manurance as should sever them in interest from the soyle, therefore they shall goe with it to the Heire.

Let us now consider of things, though not fixed to, yet usually kept in houses, viz. writings and evidences, whereabout generally, no doubt can be, but that they follow the interest of the Land, so as if they touch inheritance, they pertain to the Heire; if but Termes of years, Goods, Chattels, or Debts, they pertain to the Executor; yea so doe Statutes, and Bonds in Law (howsoever otherwise in equity) though they concerne the assurance and enjoying of Inheritance purchased. What if *A* mortgage the Inheritance of Lands to *B*, upon condition of redemption by payment of 500. pound to *B*, his Heire, or Executor, and *B* dyeth, the Deeds being delivered into his hands; now the Heire, not the Executor, shall have them; for though the money may be payd to the Executor; yet (meane time) the Land descends to the Heire, nor is there any debt to the Executor, for *A* may choose to pay, or not. Put it

on the other side, that the Land had
 beene sold for 500. pound, not paid to
 A, but a Condition that if not paid to
 him, his Heire or Executor, by such a
 day, then to re-enter; and A dieth,
 here is a debt to the Executor, and no
 Land descended to the Heire of A, yet
 shall the Heire have the Deedes, for that
 a Condition is descended to him. Que-
 stion hath beene touching Boxes and
 Chests, wherein the Evidences concer-
 ning Inheritance are; and although the
 better opinion in our Bookes, doth pitch
 upon this difference, that where they are
 sealed up, they shal pertaine to the Heir;
 otherwise, where not sealed, I cannot
 conceive that difference to be grounded
 on good reason; but rather thinke that
 Boxes, which have their very creation
 to be the houses or habitations of Deeds,
 should, as appurtenant to them, goe to
 the Heire, whether sealed or not. On
 the other side, Chests made for other u-
 ses, viz. the keeping of Napery, or Ap-
 parel, shall not, as I conceive, be taken as
 appurtenant to Evidences because some
 be in them, for so may other things also
 be: Nor as touching them can sealing be
 of any effect, but rather locking, and not
 lock-

41. E. 3a.
 36. H. 6. 26.
 18. Ed. 3. 4.
 3. H. 7. 15.

Ans. If sole
 use that
 way make
 a difference
 or not,

locking must make the difference touching them, if any difference by inclosure.

CHAP. VI.

Of things not actually in the Testator, but accruing to the Executors, by or after the Testators death.

THere be of divers sorts, the first, and chiefe whereof are things gotten and acquired by Action of Suite. Secondly, by Condition or Covenant without Suite. Thirdly, by Remainder.

Of things in Action.

TO speake first of the first, it is cleare, that debts due to the Testator, be it by Bond, Statute, or Judgement, or for Arrearages of Rent, are not Assets to charge the Executor, untill receipt of them; and it is cleere that the Action to recover these doth pertain to the Executor, and that the debt and damages recovered shall be assets to charge the Executor. So also of Actions of Detinue, and of

See Stat. 32.

H. 8. cap. 37.

Remedy for

Rents of

Inherit-

ance, or for

life.

20th year

20th year

20th year

of Covenant for any thing personal, or any Chattel Real, Lease, Wardship or the like. But perhaps some will doubt of Covenant touching Inheritance, viz. the assurance of Lands or enjoying thereof, free from this or that incumbrance or the like: Yet even in those cases, if the Covenant were broken in the Testator's life time, I thinke cleerely the Action is accrued to the Executor, for that his Testator was to recover damages in the Action of Covenant for that breach, and he being intituled to these damages as principal, and not any accessory thing in that action, the Law hath cast that action upon the Executor. And that is the cause why, if waste be committed in the life of the Lessor by his Lessee, and then the Lessor dyeth, his Heire can have no Action for this waste, viz. because he cannot recover the treble damage; so neither can the Executor have it, for that he cannot recover *locum vastatum*, the place wasted, the Inheritance whereof is in the Heir.

That the Executor at the Common Law could not maintain an Action of Trespass for goods of his Testator, taken away in his life time, seems to be implied by the Statute in the time of K. Edward

the

A Charge
of the Te-
stat. Taber.
become
void in his
life, comes
to the Exor.
as a thing in
action but is
not Assets,
for not ven-
dible.

11. H.4. 32.
45. E. 3. 3.
No. 4. 6. 59.
4. E. 3. c. 7.

And the
like given
to Execu-
tors of Ex-
ecutors
Stat. 15. E.
1. c. 5.

17. E. 3. Fil.
108.
1300. 10115

1300. 10115
1300. 10115
1300. 10115

c. 21. meant
us credo.

21. H. 6. 1.
but Mark-
ham & contra

21. H. 6. 1.

32. 48. 3.

32. 48. 3.

the third, which gives such action : Yet it seems that a *Replevin* was main-
tainable by the Executor, at least in some
cases, for goods taken or distrained in the
Testators life time : But in case the dis-
tresse were for Rent, or Service, it is said
a little after the making of that Statute,
that the Lord may not now avow for his
Rent, or Service, because his Tenant is
dead, but must set forth the matter, and
thereupon justify to excuse himself from
answering damages, and the Executor
shall by this Action recover the Cattel
or Goods, and that by the Common Law,
saith the Booke, although the Statute of
Marebridge had never beene made, for
that the propriety remained in the Testa-
tor. I Note, it speaks not at all of the
said Statute of 4. Edward the 3^d. But
Newten in the time of King Henry the 6.
would have it, that the Executor in that
case should not have a *Replevin*, but an
Action of Trespasse grounded upon the
said Statute, viz. 4. Ed. 3. Which me
thinks cannot be by any meanes, by rea-
son of the Statute of *Marebridge* cap. 3.
Non ideo puniatur dominus, &c. for the
Executor, as well as his Testator, is there-
by restrained, as I thinke, from the Acti-

on

on of Trespasse against the Lord. As for that no Avowry can be made upon the Tenant, that is now remedied by a late Statute; The other Statute hath been taken to extend to other things than goods moveable: for where a Church becoming void, a stranger presented thereunto wrongfully, and the Patron dyed, it was resolved in the late Queenes time, that the Executor might by the equity of the said Statute, maintaine a *Quare impedit*. But whether an Action of Trespasse lyeth for an Executor; against him who spoyled the Testators Corne, Grass, or Wood growing, hath beene questioned, but no where resolved to my knowledge. I thinke it may lye, with some difference: First, for that the Statute of 4. Edward the 3. doth not onely speake of Goods carried away; as limiting the Law to that trespassse soley and particularly, but speakes generally of Trespassse done to Testators; and then brings in that particular of goods, as one Instance. Now there be many cases of instances or ensamples given in acts of Parliament, which yet doe not restraine the remedy or *provision* to that particular, or from extending to other cases of like nature.

The B. of
Covenand L.
and Sales
case M. 32.
6. 33. Eli. in
3. 3. 3. So of
Ravish-
ment. D.
gard. 7. H. 4.
2. 6. 7. H. 4.
6. Ejoff.
Firm. as Tild.
De clausis
fraffe
meerely it
lyeth not.
11. H. 4. 3.
This Perian
Just. did ve-
ry judici-
ously urge
in Sales case
supra.

ture. Thirdly, the Stat. speaks of trespasses remaining unpunished, which is meant to redresse. But it should still leave many unpunished, if it should have no larger extent, then to that one singular trespassse, of Goods taken away, viz. moveables. Again, the Testator was cleere-ly intituled to a recovery of damages for this other trespassse, which if he had recovered, should have come to his Executor; Yea the things themselves, all, if felled in the Testators life, and part though not felled, should have come to the Executor; therefore also, the damages recoverable in lieu thereof, out of which (recovered) the Debts and Legacies of the Testator are to be satisfied. Beside, this Action of Trespassse is a thing severed from the state of the Land, so as if the owner thereof had, after this trespassse done, aliened the Land, yet had not this Action remained to him, as I take it, clearely. And why not as well as where a Trespassse is done upon the Lands of the Lessee, and then the terme expires, this doubtlesse doth not take away his Action, nor his Executors. But me thinkes here may be some differences probably taken, as first, betweene a Trespassse

passé in destroying or taking away Corn growing, and a trespassse in Grasse or Wood growing: for the first being of that nature, as that, though the Owner had a state of Inheritance in the Land whereon it groweth, and should have died before severance and felling, Yet it should have gone to the Executor, and not with the Land to the Heire; therefore doubtlesse doth the Action for destroying or taking away thereof, accrue by the operation of Law to the Executor in lieu of the thing taken or destroyed. Otherwise, perhaps, of Wood or Grasse, Which by the Owners death should have gone to the Heire, and not to the Executor. And yet here again another difference mee thinks may be betwixt Grasse and Grass, viz. betwixt that in pasture and that in Meadow, yearly mowed and turned into Hay, nor left to be consumed by the mouthes of Beasts, as that growing in Pasture: For as the Law distinguisheth between these Soiles, it gives precedency to Meadow and makes it waste for a Lessee to plow it up; not so for Pasture. Yea, Tithes is paid of Hay, but not of Grasse growing in Pastures; so the Meadow Grasse being in the Owners

H

purpose

purpose and intention, as a thing severed from the soile, should me thinks so be also in the eye and estimation of the Law, and therefore stand in a different state, and account from Pasture Grasse. A third difference may be in the manner of the Trespasse, viz. Where the Meadow Grasse is eaten up with Cattel by a Trespasser, and where by him mowed and cartied away as Hay; for in this latter case an Action of *Trover* and *Conversion* for so many loades of Hay, is doubtlesse maintainable by the Executor, though it should be admitted that in the other case of consumption by the mouthes of Beasts without severance, no Action should be maintainable by the Executor; which yet I admit not, but think the contrary probable. For when Meadow ground, which yearly conceiveth (*Sol sine homine generat herbum*) shall bee ready to be delivered of her burden, if a stranger putting in a herd of Cattel, which swallow up, and tread down this fruit of her wombe, before the Mower with his sickle come as a Midwife to help her delivory, if then by the hasty death of the Owner, before Action brought, this great Trespasse should be dispensable, it were

At least, me thinks, Action upon the case here and before should bee maintain-
a b.

were contrary, as me thinks, to the purpose of the said Statute, and a great defect in the Law. Yet here perhaps touching this, a fourth difference may be, or arise out of the time of the death of the Owner, *viz.* where he dieth before time of Mowing, and where not; for *Dato*, that in the former case, because, if such destruction or consumption had not beene, yet the Owner dying before severance, this should not have come to the Executor, but have gone with the soyle to the Heire, that therefore the Executor, who is not damified, should recover no damages. Yet in the other case, the Owner living till after Hay time cleerly passed, *viz.* till the end of *August*, me thinks now, since this fruite of the Meadows wombe should have been a Chattel severed, had not this Trespasser made unlawful prevention: Therefore the Executor to whom the same should have come, towards the performance of the Will, should have out of the said Statute, an Action and remedy reached unto him to recover recompence in damages for this wrong done in *retardationem Executionis Testamenti*. A fifth and last

H 3

diff-

difference may perhaps be in the state of the Owner; for *Posito*, that where the Land is his Free-hold or Copyhold Inheritance, no Action should be given to his Executor for Wood or Grats taken or destroyed in his life time; yet where hee is but Tenant for yeares, Gardian, or Tenant by extent, so as the very state in the Land was to come, and is come to the Executor (together with *Quicquid plantatur solo*) me thinks the Executor should have, together with the state in the soile, the Action to punish the Robber of, or Trespasser upon the soile. Thus having scanned and sifted, to the best of my ability, all differences and circumstances of this point, how far I am wide, and wherein right, *Aliorum sit judicium*, or rather, *Altioris esto judicii*. But this is clear, that wheresoever Executors do recover any damages for trespassse, or other wrong done to their Testator, the money recovered (at least, if Execution bee had, or mony received) wil be Assets in their hands, as wel as debrs recovered upon Bonds or Bills, or Lands, by them taken in Extent upon Statutes, Recognizances, or Judgements. Yea, without ever having

3 H 6.3
Lentson f.
43 a.

So held in
Siles case of
damages in
Quia immod.
recovered
rents of the
pr. sent-
ment.
Releasing.
13 Ed. 3.
Fit 91.

having these moneys, Executors may make them Assets in their hands, viz. by making Releases or Acquittances, or acknowledgement of satisfaction, for this amounteth to a Receipt, and chargeth the Executors towards the Creditors, with the whole penall summe, though haply they receive but part, as the principall, or some like proportion. Therefore, there is great caution to be used by Executors in this kinde, that unlesse they be sure they have goods sufficient to pay all debts and Legacies, they make no Release, Acquittance, or acknowledgement of satisfaction, for more then they do receive, be it debt or damages. And the like caution to be used by them, touching submission of debts or damages to arbitrement, wherby discharges of the same may grow; for the submission to the Arbitrement, being their voluntary act, although the Arbitrators by their judgement do discharge the debt or damage in part or in whole, yet shall the Creditors have like remedy thereupon against the Executors, as if they had released, or, which is more, received the same.

Other Actions there be of discharge,

H 3

which

Error 11
H 4 65
46 B 23
Yet upon a
verdict in
Q. a. imple.
the Wife, not
the Execu-
tor of Hus-
band did
seize.
9 H. 6. c. 4.

which as the Testator himself in his life time might have had, so may his Executor after his death, viz. Writs of Error, Attaint, Dilceyt, *Audita Querela*, *Identitate nominis*. But this last is given by Statute. Whatsoever is regained by any of these wayes, as unduely lost by the Testator, shall also be Assets.

Special cases pertinent to the Premises.

1. Chattels come to Executors from the Testators, yet not Assets.
2. Assets which be no Chattels.
3. Things in Action, and in the personallty turned into Chattels Real, & c. contra.

AS to the first, I exemplifie thus, *A* makes *B* his Executor, and dies; *B* makes *C* his Executor, and dies. The Goods left by *A* to *B* as Executor, far exceed his Debts, and Legacies; or let us suppose no debts nor Legacies of *A*, and that *B* dieth much in debt, above the Goods he leaveth, and did make no alteration of the property of the goods of *A*, but meerly left them to *C* his Executor. Now shal not the Goods which came

came to *B* as Executor of *A*, and so from *B* to *C* liable in Law to pay the debts of *B*. yet in Conscience me thinks they should, and that *C* should not receive them to his own use, as in Law he may, where *A* left no debts. But if *A* making *B*. Executor, did also by his Will give him all his goods; and hee in his life time made election to have them as Legatee, or by his Will, did so dispose of them, or appoint them to goe, as the goods he had as executor, they could not be otherwise given or disposed; Now by this election they were altered in property from being his as Executor, and so as his owne goods should bee liable to his debts. But things in action could not be so given or disposed, viz. Debts, &c. yet if *D* were indebted to *A* one hundred pound, and *B* his Executor took new Bond of him, or another for it, giving up the old Bond, now was it become his owne debt, and so shall stand in his Executor.

Another instance of this thus; If *A* Patron of the Church of *D* grant to *B*. the next avoidance, the Church becomes void, *A* dies before he presents, his Executor presents, and hath the benefice

Or if a stranger usurp in his life, and he dying, his Executor

recovers in a
Qua. imp. as
 by Sales was
 done *infra*
Mich. 32 &
 33 Eliz. So
 held in
 Sales Case,
 in com. ba.
Vendore. jure
potest. emq.
ret. 12/6
prim.

of preferring his sonne or friend, yet shal
 this make no Affets in his hands for pay-
 ment of debts; for that he could not
 lawfully take mony to present. But if
B had died before the Church had be-
 come void; Then because the Executor
 might lawfully have sold it, the value
 should be Affets in his hands, as I con-
 ceive, except perhaps the incumbent had
 died so hastily after *B.* that the Executor
 had not time convenient to find out a
 chapman, and to sell it.

If in the other Case a stranger had
 presented and got his Clark admitted,
 and the Executors of *B.* had in a *Qua.*
Imp. recovered damages, the money so
 recovered should have beene Affets.
 Thus much of the first, *viz.* that some
 things of the nature of Chattels may come
 to Executors, and yet not be Affets.

Touching the second, *viz.* that some
 things may be Affets in the hands of Ex-
 ecutors, which yet are no Chattels; I
 shall give but two instances. First,
 where a man leaveth a Villen for yeares
 to his Executors, and the Villen pur-
 chaseth Land in Fee-simple, and the Ex-
 ecutor entreth into the Land; now hath
 he Fee-simple therein; and this Land is
 Affets

23 H.8. Br.
Villanage 46.
 It hec die,
 how shall
 this be Af-
 fets in the
 Heire.

Assets for payment of the Testators debts: So, if a man by his Will give Lands in Fee to his Executors, to bee sold for performance of his Will; These (before the money thereby raised) are Assets, both for payment of debts, and of Legacies; But if the Lands had beene given to be sold onely for payment of debts, they should onely bee Assets for that purpose, and not for payment of Legacies: and so, if it were expresse to be for payment of Legacies singularly, this should not be Assets for debts, as I take it. For since these are not Assets of their own nature, but so made by the Will and disposition of the Testator; me thinks they cannot be otherwise, nor farther Assets than as the Testator hath willed and disposed; but though Lands thus given were Assets before the *Stat. 21. Hen. 8. cap. 5.* Yet how can it be so, since the very words of the Statute be, that if one will by his Testament or last Will, any Lands, &c. to be sold, neither the money therof coming, nor the profits taken, shall be accounted as any of the goods or chattels of the Testators, which I conceive to be all one, as to say, that they should not be Assets;
for

3 H. 63. &
103 H 4. 21
If by Feoff-
ment
per Markam
cap. Jus. com.
Risk-hill.

See 9 El.
Dy. 164

9. H. D. 164.

14. H. D.

31.

for when an Executor denyeth himselfe to have Assers, the forme of his plea is, *Quod nulla habet bona nec cattalla, &c.* Yet since that Statute, viz. in the late Queenes time, the Law was twice admitted, or conceived still to be according to the third of Hen. 6. viz. that the Land devised to be sold, or the money thereof coming, should be Assers. Indeed, in neither of those Bookes is there any mention of the clause in the said Statute; and it is possible that it might be forgotten, as in other Cases sometime hath happened. But casting about how to reconcile those Bookes with the said Statute, and not to suppose the same forgotten at both times, both at the Barre, and Bench (though being but a short clause in the middle of a large Statute to other purpose, it might wel so have been) at the last, though not hastily, I grew to conceive, that the said clause being in an Act, which limiteth the Fees of Ordinaries, and their Scribes, according to the value of the goods of the deceased, and then bringeth in this clause, that the Lands willed to be sold, shall not be accounted as any of the goods, &c. The Parliament meant thereby only to exclude them

them to this purpose, that they should not be accounted as part of the goods in the valuation, according to which the said Fees were to be rated; and though the words be general, that they shall not be accounted as any of the goods, &c. yet is it the more probable, that the Parliament meant no further then as aforesaid; because that clause after the Fees limited in answerableness to the values, is brought in by a *Proviso*, viz. Provided alwayes, that if the deceased Willed any Lands to be sold, the money nor profits shall not, &c. And thus perhaps it was understood and construed in the said late Queenes time, though no mention be of any remembrance of that clause or provision in either of those Cases reported by the Lord Dyer.

As for the third, viz. the changing of things out of the personalty, into the realty, & *è contra*, I shew it thus: If a debt were due to the Executor, as Executor, by Statute, Recognizance, or Judgement, and he sue Execution, and have Land of the debtors in extent: now is the personal duty turned into a chattel real. On the other side, if such an estate by extent, or a Lease for years mortga-

mortgaged come to an Executor, and the debtor or mortgager payeth the money due; now are these real chattels turned into Assets personal.

Another special Case of equity opposing Law.

IF *A* be bound to *B* by Bond, Statute, or Recognizance for assurance of Land, *B* dyeth, and the Land descends to his heire; or be it that *B* sold the Land to *C*, and assigned to him the Bond, Statute, &c. yet must the Sute, or taking out be in the name of the Executor of *B*, and neither of the Heir, nor Assignee. And that which is recovered, or gotten in extent, will be Assets in Law to charge the Executor, as I take it; yet in equity it pertaines to the Heire or Assignee. *Quere*, if the Executor meddle not, but onely suffer his name to be used.

Of things come to Executors by Condition.

First, we will consider of Conditions bringing back to Executors goods, or chattels granted away by their Testators. Touching which, there is no doubt, but if the Condition be any other than for payment of money, or other things

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valuable by the Testator, or his Executor, the chattel returning to the Executor is Assets in his hands: as put the Case a Lease for yeares, Horses, Sheepe, Plate, or other Chattel, were granted by the Testator to A, upon condition that if A did not pay such a summe of money, or doe such other Act as the Testator appointeth, and this condition is not performed after the Testators death, now is the chattel come backe to the Executor, and his Assets. But the question hath beene (and perhaps may be) where the condition is, that the Testator or his Executors shall pay the money to make void the Grant, and accordingly, the Executor after the Testators death payeth the summe out of his owne purse, not having any money of the Testators in his hands: in this Case coming in question, *tempore Hen.* It was resolved at the last, *31. Hen. 7.* that this redeemed chattel should not be Assets, but be to the Executor as his owne proper goods, though at the first, three Judges were of contrary opinion, *viz.* that the goods redeemed should be in the Executor, as goods of the Testator. And truly I must confess that I cannot yet finde good satisfaction

on in that Bookes resolution, except we shall take the Case there to be such as that which is put and reported by the Lord Dyer, *tempore Hen. 8. viz.* that the money paid for redemption, was as much as the full value of the goods pledged, or mortgaged; or else shall admit the Case to be, that this redemption was not by payment at the day conditioned. As to the first, it were rare, if any should lend money upon a mortgage, where the thing mortgaged is not of better value then the money lent; rare also, that an Executor should take care to redeem with his owne money, that which should yeld no benefit or advantage to him, or his Testator. Let us therefore scanne and examine the Point, since the same may come frequently in use; and this we may the more decently doe, because the Lord Dyer in the Margent of the Case by him reported, as aforesaid, saith expressly, that the said other *rem. Hen. 7.* was not at all adjudged, himseffe having viewed the Roll, which he there sets down, and the names of the parties. We will therefore put the Case thus. A possessed of a Lease for sixtie yeares, of one hundred pound Land,

Land, mortgageth it for five hundred pound; or be it that the mortgage or pledge be of a Jewel, or peece of Plate for halfe the value, and that before the day limited for payment, and redemption, *A* having made *B* his Executor, dyeth, and *B* at the time and place maketh payment, as was conditioned. Now the question is, whether this Lease, Plate, or Jewel, being worth much more than the sum for which it was mortgaged, shall be in him wholly in his owne right, and to his owne use, or partly, if not wholly, as Executor to *A*, so as to be subject to the payment of Debts and Legacies. Here it must be clearly admitted, that *B* was inabled to this redemption onely, and meerly by the Condition annexed to the mortgage, or pledging. It must also be admitted, that this Condition, and the power or interest to take benefit thereof to him, came, and was derived onely as Executor of *A*. This being premised, it must needs follow, (as to me it seemes) that the Condition working, and having his operation in the redemption to destroy the Grant, mortgage, or pledging, it must needs make these againe the Testators goods, *in statu*

tu quo prius, and so to be in *B* as Executor; since in that right onely he was intituled to take benefit of the Condition. For what is it which hindered, before this, from being the Testators goods? nothing certainly, but onely the force and strength of the mortgage or pledge: Now by the redemption that is become void, and hath lost its force; therefore the property of these things must now needs be, as if no such mortgage or pledge had beene, or as if it had at the first beene void, and of no force. Thus must the Condition worke for him who made it, *viz.* At the Testator: and those of the contrary opinion in the time of King *Henry* the seventh, do yet say, that by this redemption the Testator is so much indebted to the Executor, as he disbursed for the redemption; which could stand with no reason, unlesse by it the property and interest should be reduced to the Testators behoof. That thus it is, is also proved, as to me it seems, by the Case of mortgage of Inheritance, upon which the Heire making payment, according to the condition, is not now in as a new Purchaser, but as Heire; so

so as he shall have his age, and bee in Ward even for this Land; Yea, it shall be Assets in his hands, for satisfaction of his Fathers, as other Ancestors debts; which in some respect is a harder Case than that of the Executor, for he hath means to satisfie himself of the money disbursed, either out of the thing redeemed, or other goods of his Testator, but the heire hath no such meanes. Yet it will be asked how the Executor can be free from mischief, for if this thing redeemed be intire, as the Cup or the Lease, the whole will be taken in execution for the Testators debt. To admit this, yet here is one cleer way of remedy, viz. the Executor may before such execution, sell the thing, and so pay himself, and retain the surplisage to the Testators use, and the like of this is frequent in use, viz. for Executors to pay off the Testators debt with their own mony, and to make themselves satisfaction out of the Testators goods. Besides, it is not impossible, that this redeemed thing should be thus in interest parted, that answerably and proportionably, to the sum disbursed for redemption, with reference to the value of the thing redeemed, a moyety

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or third part, or three parts thereof should be to the Executor in his owne right, as his own proper goods, and the rest in him as Executor. As *posito*, that *A* and *B* were tenants in common of such an entire Chattel: *A* maketh *B* his Executor and dieth. Now hath *B* one moyety as Executor, and another as his own proper, and upon a Judgment against him as Executor, that moyety only which hee hath as Executor, must be taken in execution; and here may be remembred how in execution of a Judgment, or levying of an Amerciament out of an intire Chattell of more value than the sum to be levied, the whole is to be sold, and the surplusage above the debt or Amerciament is to be delivered back to the Owner. For in all this debate we must presume the thing redeemed by the Executor, to be of better value then the sum paid, else we may easily admit the whole to the Executor. Again, the Lease for years, is not so intire a thing; I mean the Land let, but that thereof partition may be made; yea inforced by Action betweene joint-tenants, and Tenants in Common. But here will be objected, the Case of redemption by the daughter

daughter and heir; who though she have a brother born after, so as now she is no longer heire, yet she shall, as the book saith, retaine the Land redeemed from the Heire, as a *Perquisite* or Purchase. As for this (which I will not oppose) the Law so frameth to the favour of the daughter, because of great mischief to her, if being stripped of the rest of the Inheritance by the birth of a brother, she should also lose that which her money had redeemed, without having any remedy to have her money again, or any recompence for it; but in the other Case, there is no such mischief, for that the Executor may pay himselve, as hath been shewed.

Now on the other side, if the Case shall be understood, that the redemption was by payment after the day, then will I easily admit that the property or interest, is in the Executor to his own use; or that the Condition, now having no power to reduce it back, or to operate any thing, it is rather a re-emption than a redemption, since it was at the Will of the Mortgagee, to dispose it at his pleasure, and any stranger, as well as the Executor might thus have redeemed

med, viz. repurchased it, therefore onely Equity, and not Law in that Case can make any part of the value Assets in his hands: And so also I think, if wee should admit in the other Case of payment, at the day that the property of the Chattel is to the Executor as his own, and not his Testators goods, no part of surplusage of value, can in Law be Assets, howsoever in Equity.

Lastly, if the Executor redeeme by payment at the day with the Testators own money or goods, none will doubt, but that the thing redeemed is in him as Executor, and the mony by him paid for redemption is well Administred, the goods redeemed being of better value. But this way it makes no difference, whether the whole value of the goods redeemed, shall be held Assets; and the money paid for redemption stand drowned therein, or that that summe be still adjudged in the hands of the Executor, as Assets, and onely the surplusage of the thing redeemed over and above the sum paid for redemption.

Things

*Things accrued by Covenant or Assump-
tion.*

IF *A* Covenants with *B* to make him a Lease of such or such land, by such a day; and *B* dieth before the day, and before any Lease made; now must *A* make the Lease to the Executor of *B*, and the Lease so made to him, shal be in him as Executor, and consequently as Plow. Con. Affers. This is proved by the judgement, in the Case between *Chapman* and *Dalton* in the late Queens time. Yet I confesse, that it is not expressed in the resolution of this Case, that this Lease should be Affers, but that the Executors should have the Terme as Executors, which implieth as much in my understanding, and the declaration wherenpon the Defendant demurreth, sets forth the breach of that Covenant to be in *retardatione executionis testamenti*, so as the damages thereupon recovered, viz. 330 l. were Affers, and consequently also, should the terme have been in lieu and recompence whereof these damages were given. The like Law, if *A* assume upon good consideration to deliver in to *B* by such a day, 20 quarters of Malt, or so many loads of

Coals or Wood, or any other Wares or Marchandise, and this is not performed in the life of *B.* but after to his Executor; it shall be to him as Executor, and shall be Assets in his hands, as well as the mony recovered in damages for not performing should have been.

Of things accrued by remainder or increase.

IF a Lease be made to one for life, the remainder to his Executors for years, and he dieth, this will be Assets in the hands of his Executors, though it were never in the Testator, as was in the latter end of the late Queens time, resolved by three Justices, the Lord *Anderson* only being of a contrary opinion; and there it was said that *Cranmers* Case, wherein the contrary in effect was resolved, was of little authority, for that there were first two Judges against two, till after *Monnson* changed his opinion, upon a conceite, that there the estate was by way of use, which could make no difference. Like Law where a Lease for years is by Will bequeathed to *A* for life, and after to *B*, who dieth before *A*,
al-

although *B* never had his terme in him, so as that he could grant or dispose it, yet shall it rest in his Executor as his goods, and be Assets. As for a remainder for years, so in the Testator, that he might grant or dispose it at his pleasure, no doubt can be thereof, though the same fell not in possession to the Testator in his life time, yet no scruple nor doubt can be, but that this is Assets to the Executor, even whilst it continues a remainder, and before it falleth into possession, because it is presently valuable and vendible. Nor much of other nature to these, are the Cases, where the Executor Merchandizing with the goods of his Testator, maketh gaine thereof. So if the Sheep, or other Cattel of the Testator doe breed, *viz.* beare Lambes, Calves, Colts, &c. after the Testators death, even these which were never in the Testator, shall yet be Assets, and so the Wool growing upon the Sheepe after the Testators death. But there is one Case worth the consideration and worthy of some doubt, as I thinke, and that is this; One leaveth to the Executor a lease for years of Land, worth twenty pound by the year, and the Executor

11 H. 6. 35
per Babington.

keeping this in his owne hands; one year after the Testators death, doth make thereof thirty pound in clear gain above all charges; now whether, as to a Creditor, this whole thirty pound shall be Affets, or only twenty pound; and the Case simply thus put, shall be understood of an occupying and manuring without any stock of the Testators; and then if the Executor did stock it with his owne Sheep, or other Cattell, as hee must have borne the losse by rot or death, so is it reason, that if the manurants prove gainfull, he reap the fruits thereof in recompence of his adventure, and of his industry, skill, and good husbandry. But if the Testators stock of Sheep and Cattell were (as of necessity, or for the better advantage of the Testators estate) continued upon the lease Land, then is it reason, that the gain or loss whosoever of them God sendeth, do redound to the Testators estate. Like Law (as I think) if an Executor, finding that he cannot instantly after the Testators death, let the lease Land neer the value, shall therefore buy seed-Corn, and hire the plowing &c. But it may be said, that the lease hath one entire valuation at the first, upon the appraise-

appraisement. To this I answer, first, that the value upon the appraisement is not binding, nor much respected at the Common Law; if it be too high, it shall not prejudice the Executor; if too low, shall not advantage him; but the very value found by Jury, when it comes in question, whether the Executor have fully administered, or have Assets or not, is that which is binding. Next I say, that if a long Lease come to Executors, of Land worth an hundred pound by year, and no sale is made thereof by the space of a yeare or more, now the term continuing of the like value, as at first, it is no reason but this hundred pound raised the first year, should goe towards the payment of debts and Legacies, rather then any of them should be unpaid. This thing, I mean the knowledg of them are usefull two wayes, *viz.* First, to give light to Executors, to discern what unto them of right pertaines: Next, to shew unto Creditors and Legatees, what, and how far things shall be Assets, that is to say, goods to enable, charge, and bind Executors to pay debts and Legacies. For whatsoever any of these wayes cometh to the Executor from their Testator, or
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is recovered by any of these Actions, shall be in their hands Assets; the cost and charges of recovering deducted.

CHAP. VII.

What manner of Interest an Executor hath in his Testator's Goods and Chattels; and how different from the common Interest which they or others have in their own proper goods.

THe Interest which an Executor hath (as Executor) in the goods of his Testator, is much different from the absolute, proper and ordinary Interest which every one hath in his own proper goods, as may well appear in and by these points: 1. Although a stranger take away these goods, the Action of Trespasse for the Executor, is of generall form, *Quare bona sua cepit*, calling them his goods; whereas a man outlawed in Debt, &c. or convicted or attainted of Felony or Treason, forfeiteth all his own goods; yet these which he hath as Executor, shall not be forfeited. If a Villein be made Executor, his Lord cannot

24 E.3. f.35

32 H.6.34

not take these goods, though hee may take all the Villeins own goods : and for taking such goods, or for a debt due to the Testator, a Villein may sue his Lord. Nay, if the Executor grant all his goods, some good opinion hath been, that these which hee hath as Executor, should not passe ; yea the Lord *Dyer* so held in the late Queens time, with this difference, viz. Where the Grantor is named Executor in the Grant, there the goods which he hath as Executor should passe ; but otherwise if he be not named Executor in the Grant. And that this opinion is probable, will further appear by that which followeth.

Secondly, the Executor cannot by Will give or bequeath the goods hee hath as Executor ; and if he die intestate, and Administration of all his goods is committed to *J.D.* yet hath he nothing to do with the goods which the Intestate had as Executor to his Testator : Thus all his goods reacheth not to his goods as Executor.

Thirdly, whereas a mans goods stand liable to the payment of his debts, both in his life-time & after ; the goods which a man hath as Executor, are not to be taken

Lis. sit. Vil.
lenage 41.42
10 E. 4. f.1.
Yet 39.H.6.
f.15. A re-
lease of all
actions by
an Executor
extincts aci-
ons as Exe-
cutor. But
Fremick is a-
gainst it in
20.Hen.7.
Kel.64.

See these so
resolved in
Pl. Com. 5.25
inter Bransby
& Grantham
P.20. Eli.

taken in execution for his own debts either upon a Recognizance, Statute, or Judgment had against him. And if such a one die indebted, leaving to his Executor much goods, which he had as Executor,; these are not Assets in his hands, lyable to the payment of his debts, but onely for the payment of the first Testators Debts or Legacies. Therefore a *Quo minus* brought by an executor, shewing that he was not able to pay the Kings debt, because the Defendant detained from him an hundred pound, which he owed him as Executor to *7. S.* was overthrowne; for that it could not be intended, saith the Book, that the Kings debt could be satisfied with that which the Plaintiffe should recover and receive as Executor. Whereas a woman being possessed of any chattels personal, *viz.* moveable goods, all be devested out of her into her Husband by her marriage, so as if he die, and she overlive, they be not hers again, but her Husbands Executors or Administrators; and if she die, all be the Husbands, without being Executor to his Wife. It is not so of the goods which she hath as Executor, these still remain in and to her, if her Husband die: and if

if she her self die, for that she hath them as it were in anothers right, viz. as she represents the person of her Testator, her Husband shall not have them, if he be not his Wives Executor, and so Executor to her Testator.

Lastly, whereas the Writ of Trespasse seemes to make no difference betweene ones own goods, and those he hath as Executor, that being a possessory Action or Suit grounded upon the possession; yet come to an Action of Debt, which more tastes and participates of the right, and there are they differenced: for where for my own debt, when I sue, the Writ saith, *Debet & detinet*, viz. that the Defendant owes me, and detains from me that summe. Yet when I sue as Executor, the Writ saith not *debet*, he doth owe me, but *detinet* onely, he detaines from me, as admitting that he is not Debtor to me, though he should pay me; and so where I am sued as Executor, the Writ makes me not a Debtor, but a detainer; Otherwise, where in my owne right, I owe and am sued for a debt; Accordingly, where Judgment in an Action of debt is given against one as Executor, it is not generally that the Plaintiffe shall

This may be in his name onely out of whole possession the goods were taken.

Co. l. 5. f. 31.

shall recover against him; but he shall recover of the goods of the Testator; and therefore upon this judgment no *Capias* lyeth against him, to inforce him to pay by arrest of his body, because he is not properly Debtor: but if after it be returned, that he hath wasted the Testators Goods, out of which the said debt shall be satisfied, then he having made himself a debtor, a *Capias ad satisfaciendum* shall be awarded against him, and then he shall be taken in execution. So also in some cases of false plea pleaded; for where the Judgment is *de bonis propriis*, the Plaintiffe may have a *Capias ad satisfaciendum*, and that Judgment is in divers cases for the damages, although not in many for the principal. As for the *Capias* before Judgement, in the mean *Process* against an Executor, that is because of his Contumacy in not appearing upon the former *Process*.

34. H.6.45

The reason of this different interest between an Executor and another, or between the same mans having goods as Executor, and others in his own right; as also of the different manner of ones being indebted as Executor, and otherwise in his own right, is well expressed by

by the Lord Cooke in *Pinchons* case, .viz. First, that the goods which one hath as Executor, he hath not in his own right, but in *auter droit*, that is, in the right of another, meaning his Testator. Secondly, that Executors are but the Ministers and Dispensers, or Distributers of their Testators Goods.

Co. lib. 9. 88
b.
See this also
Plow.
com. 5. 20 a.

Of alteration of property in the Executors hands, so as some goods become his own, which he had as Executor.

TO this head or Chapter, treating of the difference between the interest in Goods as Executor, and others had merely in ones own right, and to his own use, it is not impertinent to consider how that which one hath at the first as Executor, may be changed in property, and become the Executors own to his own use, as either his goods, which he had not as Executor. Here let us first consider of ready money left by the Testator; for since pieces of money, .viz. shillings, groates, pieces, and half pieces of gold, cannot be known one from the other, it must needs follow, that these coming to an Executor from the Testator, must in some sort

sort be altered in property, so as though the Executor shall be said to have so much in money or value, yet can it not be discerned which money in his house was his Testators, and which his owne. Consequently the Sheriffe upon the *fieri facias*, for a Creditor, who hath recovered against the Executor a debt owing by the Testator, cannot take away money in execution as the Testators, in my opinion; *Quere* if thereupon a *devastavit* shall be returned, or what shall be done?

But what if the Testator were indebted to the Executor, or if the Executor not having ready money of the Testators, or otherwise, shall pay a debt of the Testators with his own money, what shall we say of the Conversion or alteration of some of the goods from being his as Executor, to be his meerly in his owne right? Hereof I have shewed elsewhere my conceiving, which is briefly thus; That except either he have in his hands money of the Testators, (for of that it is easie to make a proportionable change) or unlesse the summe to him owing from his Testator, or by him paid for his Testator, amount to the full value of all the Testators goods in his hands, or do exceed

2 Bl. Dy. 18;
This divers
Bookes af-
firm, sect.
20 H. 7. 4 &
Kelw. Rep.
59 & 2. 3.
El. Dy. 147.
6 H. 8. Dyer
fol. 2. a.

ceed the same, no alteration can be untill some election or declaration by the Executor made, which of the goods, not exceeding the debt unto him, he will have to be his owne; For where the Testators goods exceed this debt to him, the property of all cannot be changed, and of what part shall the Law adjudge the change, till choice by the Executor? It is good therefore for him to doe as the Mother Guardian in Socage, who is to endow her selfe, calling her neighbours, and expressing to them which part of the Land shee will have for her dower. So let the Executor doe, but let him take heed that his election or declaration exceed not his debt, lest it be void. And that such particular election is to be made, seemes to me proved by the Case of 21 E. 4. fol. 21. where the payment of money, and detaining or taking of a Horse of the Testators, is mentioned; But *Choke* there sayes, this cannot be done without the Ordinaries assent. And the Reporter thinks, though the Ordinary doe assent, yet the property shall not be turned into the Executor as his owne.

Plow. 344
So of a Legacy in money given to the Exec.

See 2.3 BL.
Dyer 187

K

Another

2. Another alteration is of the profits of a Lease come to the Executors from the Testator. For since no more thereof shall stand in the Executor as Assets then so much only as exceeds the yearly value, according to the resolution in *Hargreaves Case*, it must needs follow that the residue of the profits must be the Executors, he paying the rent out of his own purse, as that Case resolves in consequence, viz. that he shall be sued for it in the *debet*, and in the *debitum* only as for the rent due before the death of the Testator. Thus though hee have the Lease as Executor, yet part of the profits are meetly his owne, not as Executor.

Co. l. f. 31 b.

And looking back upon this Case, we may discern a necessity sometimes of the Executors paying with his owne money for his Testators debt, as where the Testator being to pay a rent at *Michaelmas*, or our Lady day, dies a day or two before; or to put it more clearly, a day or two after the Feast, not leaving any goods to pay the rent, other then the future profits of the Lease. Here, unlesse the Executor will forfeit the Lease, he must lay out of his own money.

Now

Now if in this and other like Cases hee could not do this until he had under seal, or by act in the Court Spiritual, an assent of the Ordinary, it would be an extraordinary trouble to Executors.

I find also *tempore Hen. 7.* another mean of altering property (to wit) where a *fieri facias* comes to the Sheriffe ^{20 H. 7. 3. d.} to sell, or leavy a debt of the Testators goods; now saith the Booke, may the Executor buy these goods of the Sheriffe as well as another, and if he doe, the property which hee had as Executor shall be turned into a property *in pure propriety*.

If an Executor amongst his Testators goods, find and take some, not his, and after these being claimed by the owner, who testifies them in the Custody of the Testator, the Executor not crediting the claime, still keeps them, and the owner thereupon recovers damages in an action of trespass, or of *Trover* and *Conversion*; now (and so in all other like Cases) are these goods become the Trespasors in ^{20 H. 7.} property, because he hath paid for them; ^{Kelw. Ca. 58.} therefore it is not strange, if in like manner an Executor paying out of his owne purse, for or in lieu of the Testators

K 2

goods,

goods, have so much of them (where no certainty) changed in property and become his own. This is but put as an instance understood with the exceptions and cautions precedent.

CHAP. VIII.

Of some cases and questions between the Executor and the Heire.

21 H 6. 30
If other
goods taken
among them,
he is excu-
sed.
21 H 7. 25
Vide l. 1. arr.
640 It is
so pleaded.

THe Executor may in convenient time after the Testators death enter into the house defended to the Heire, for the removing and taking away of the goods, so as the door be open; or at least the key be in the door: and this I understand of the door of each room; for although the door of entrance into Hall and Parlor be open, the Executor cannot by that justify the breaking open of the door of any Chamber to take goods there, but only may rake those in the rooms which be open; and this is proved, as to me it seems, by the Case of the chest with Evidences, which, saith the Booke, the Executor may

may take and put out the Deeds, delivering them to the Heir, viz. the chest being unlocked, as I understand it. Now a Chamber or other room within a house locked is an inclosure of better respect than a chest. But if the goods be not removed within convenient time, the heir may distrain them as *damage feasant*.

43 B 3.24
Bro. 145
Makes a
quæ. if it be
locked.

Plow. Com.
280

Where the Testator recovered land and damages, or a deed and damages, he dying before Execution, the Heir shall have execution for the Land or Deed, and the Executor for the damages: but *temp. Edward the 4.* it is said that until the Heir sue a *Scire Facias* the Executor cannot sue execution for the damages.

43 Ed. 3.2
10 Ed. 4.5,6
Of the deed
Execution
first.

If a Creditor be made Executor by his Debtor, and pay himself part out of the Goods, he cannot sue the Heir for the rest, because the debt cannot be apportioned; but otherwise, he may, saith the Booke: yet *Quæ.* if he do take upon him the Executorship, and have goods sufficient to pay all.

12 H 4

If a debt be recovered against one who dieth before execution sued, leaving goods sufficient to satisfy: now shall not the Land descended to the Heir be charged.

7 H 4. f. 31
See Bro. Ex.
124.

ged therewith, nor by like reason, any land conveyed after Judgement.

Co. l. 3. f. 90.

91. To like

purpose see

more, Linl.

177. b. 2 B.

177. 281.

How. com.

291.

21 H. 7. 4

See a good difference where land is conveyed, upon condition of payment to the Vendor his Heires or Assignes, and he dieth before the time, and where it is to be paid to the Vendee his Heires or Assignes, and he dieth; in the first case, payment shall be to the Executors, but not in the other.

What things pertain to the Heir, and what to the Executor is before shewed. As for *Frowickes* opinion, that where goods be mortgaged upon condition, that if the Heire or Executor pay, &c. here if the Heire make payment, hee should have the Goods. I see not how that can be.

A Directory for the following Chapter.

A. All (as but one) represent the Testators person, and must joyne and be joyued in suite, & c. contra.

B. Where one alone must answer suite, and how.

C. When they differ in Plea, the best shall bee

be taken, but one may confesse alone.

D. One as well as all, hath, may give assent or release the whole.

E. One cannot give nor release to another, nor divide.

F. The possession of one is the possession of all, to what purpose.

G. If the survivor die Intestate, the Testator is Intestate, though the other Executor left an Executor.

H. Executor Included in the person of the Testator, and represents it. Is his Assignee; all one, & c contra.

I. What change by death of the Testator, touching proceeding in suit.

K. Proceed to in Execution; where without Scire Facias,

M. Whether the Executor stand in his own quality or his Testators.

N. Where one alone may sue.

O. In suite for them, such as will not joyn, shall be severed; and the other may sue and prosecute alone: consequents inde.

P. Death of one Executor; Plaintiffe or Defendant; where abates Writ.

C. H. A. R. IX.

How Executors stand between themselves, and in representation of, or relation to the Testator; as his Assignee or Deputy, or as the same person with him; and where, and to what purpose; as other persons.

Are as one person ; therefore cannot plead several pleas in abatement.
 37 H 6 17
 9 H 6 t. 44
 38 E 3.9
 Bro. Ex. 13
 Bro. Ex. 20,
 31
 Therefore one Executor sued, if he pleads that there is another Executor not sued, must plead that he did Administer.
 9 H 6. 44
 Bro. 13. 33.
 H 6. 38 Bro.
 20
 32 E 3
 quid juris clam. 5

First, all of them do represent the person of the Testator, and therefore must they all joine in suite against others, and in suite by others they must be all made defendants, or at least so many of them as doe Administer: for though the Executors themselves must take notice by the Will, how many Executors bee, and must frame their suite accordingly; Creditors and strangers need not take notice of any more then doe Administer, and Execute the Office of Executors. For this reason, as I take it, in the time of King Edward the third, where two Executors were of a terme, and the reversi- on was granted by Fine, mentioning but one terme, and thereupon a *Quid juris clamat*

clamat accordingly brought against that one executor; this was held good enough, though the other executor was not named in the Suit; belike, because that one (who indeed was the Testators Wife) did only occupy the land, and take the profits thereof; for else, since all the Executors do represent the Testators person, all must have been named. Therefore did the Judges resolve in the time of *Hen. 4.* that where a Lessee for years made two Executors, and one of them was distrained by the Lord for Rent, who avowed upon the Lessor, that Executor should have aid of his fellow Executor, to the end that both might have aide of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator, as one person (for so speaks the Parliament) It was enacted in the time of *Edward the 3.* that the Executors, though never so many, shal have but one essoyne, neither before appearance nor after, because their Testator whose person they represent, could have had no more.

It is further also enacted by the said Statute, that where two or three Executors or more be, they being sued in an action

13 H 4-
Aid. 186

9 Ed. 3 c. 3
A

But not, if he appear at the summons. 1. *fi* 4. 1. 14 H. 4. f. 11. But the plaintiffe must declare against all. He need not, but he may admit another to appeare and plead after. 7 H. 4. 13. But proetes must be continued against all. 7 H. 6. 35. Executors of executors by equity. 38 H. 6. 45. Bro. Exec. 99. 28 H. 6. f. 4. 14 H. 4. 23. 24. So negatively. 21 H. 6. f. 1. 28 H. 6. f. 4. 3 H. 6. 35. a. 39 H. 3. 5. There it is not meerly as Executors; it is out of the stat. 21 H. 4. 63. As if in *deb.* & *det.*

action of debt, though all do not appear; yet such one of them or more as doe; or doth appear at the *Grand distresse*, shall answer alone without his companions. And this Statute hath beene taken by equity in three respects.

First, touching the persons: that it shall extend, not to executors only, but also to Executors of Executors, yea, to Administrators also, though the Statute speake only of Executors.

Secondly, touching the Actions; whereas the Statute speaks only of the Action of debt, it is taken by equity to extend to other Actions, as the Writ *de rationabili parte bovorum*; and *detinuo*, yet perhaps this latter Action will be said not to be maintainable against Executors, for their Testators set, but for their own onely; But we yet are not come so farre as to determine what is maintainable; but whether before all the Executors do appear, he, or they which have appeared shall be put to answer; and so to bring it to *decision*, whether the Action be maintainable or not. I thinke also that in the action of Covenant, and all other actions against Executors, as Executors, hee which appeareth, must

must answer without his companions, though the greater opinion in the *Quadragesims* were contrary touching the action of Covenant. But as for the *sub pœna* against the Executors, which is to make them to answer to a suit in equity; that hath been *temp. E. 4.* taken to be out of the reach and intent of the Statute. So also of the *Latitat* in the Kings Bench, as was held in the same Kings time: except all the Executors, making up the whole representative body of the Testator, be in the custody of the Marshall, one or more of them who are there shall not be enforced to answer; and so was it also lately held in the Kings Bench, where Master Justice *Houghton* gave an excellent reason that this case is out of the said Statute, *viz.* for that this Writ doth not mention any debt, or name the Defendants Executors.

Thirdly and lastly, that Statute is extended by equity to other Writs or Process; for where the Statute speaks only of the Grand distresse, and the Executors appearing thereupon; It hath been many times ruled, that when he or they appeare upon the Attachment, *Capias*, or *Exigent*, answer must bee, though the

^B
Cont. 47. E
3.22. So 7
E 4. 20, 21
3 H 4. 20
In *fin. fan.*
upon a pardon by Defendant outlawed at their suite.
47 E 3.22
Only *Fenold* in the affirmative.
8 E 4. 5
9 E 4. 12, 13
^B
20 vel 21
Jac. regis.

^{B.}

1 E 4. 1
40 E 3.1

B
 11. H. 4. 63
C
 Or if but
 one ap-
 peare, 28.
 H. 6. f. 364
 judgement
 against all.
 See 9. E. 4.
 17, 13, 14
 Where B
 who is not
 Executor is
 joyntly su-
 ed with A
 and B con-
 fessech 21
 H. 7. 25
 Yet 7. E. 4.
 7. they
 may sever
 in pleas not
 dilatory.

C
 7. § 6. f. 6
 per. *Contra*
more.
 If they re-
 cover, and
 one of them
 prayes a
cap. ad. fac.
 and the o-
 ther a *Fieri*
fac. the first
 as best, shal
 be granted
 3. H. 4. 10
 Bro. 44.

So where the Defendant Outlawed at the suit of two Executors, and
 upon the *Sci. fac.* after his pardon but one appears, 21. H. 7. 25.

D 9. E. 4. 12. 14.

the rest appeare not; for so the word
Distress is taken for all compulsory means
 or enforcement of appearance. But
 where the Statute reacheth not, viz.
 when the Proces is determined against
 one or more, as by Outlawry, &c. there
 the rest must answer by the rules of the
 Common Law; Except it be in the case
 of Husband and Wife Executor, for
 there the Wife cannot answer with-
 out her Husband, nor doubtlesse can he
 without her, where she and not he is
 Executor; but where both be Execu-
 tors, there he may answer without her,
 but not she without him. When Execu-
 tors as Defendants have appeared, if any
 one of them will confesse the Action,
 this bindes and concludes the rest; but if
 one will plead one plea, and the other a-
 nother, that say some, shall be received
 which is best for the Testators state; so
 where they sue, such as wil not prosecute,
 shall be severed, and the rest without
 them may proceed; and in like manner
 where they pray to be received to defend
 their term, and one of them after makes

default;

default; it shall not be the default of all, but the rest; or he, if it be but one who appears, shall be received to uphold the defence of the terme.

Thirdly, so where they plead a release to the Testator or themselves, one after making default; this shall not be, nor make a total default in the Executors, to induce a judgement or condemnation against them. Yet in truth each Executor hath the whole of the Testators goods and Chattels, be they Real, or Personal, and each may sel or give the whole.

One of them cannot give nor release to the other his Interest, and if he doe, it is void, and he who releaseth shall still

have as much interest, as he to whom he released, because each had the whole before; upon this reason long since, where one of the two Executors released but his part of a debt, it was held that the whole was discharged: and so if one

Executor grant his part of the Testators goods, all passeth, and nothing is left to the other, for that each hath the whole, and there be no parts or moyeties between Executors. Therefore, also though a Lease for a thousand yeares, of a thousand Acres of Land come to two

²¹ E. 3. 13
²⁷ H. 8. 31

²² DE

C
If an horse
come to
four Exe-
cutors, each
hath an
horse. and
yet all
four have
but one.

Exc-

E Executors or more, no partition or division can be made between them; because it is not between them, as between joynt Lessees of Land, where each hath but a moyety in Interest, though possession of or through the whole. Amidst

D Executors each hath the whole, & therefore if he grant his part, he grants the whole. But one Executor may demise or grant the moyety of the Land for the whole term, and so may the other doe; and this way they may settle in friends or others trusted for them, a moyety for each; either in several or undivided, but one of them cannot make a lease to the other of any part, for he had the whole; nor can one sue the other as Executor, yet if the Testator devise to one of his Executors, all his goods, after such debts and Legacies satisfied, there after those satisfied, the Executor may take the Goods, and maintaine an Action of Trespass against the other Executor, if he take them from him, and consequently an Action of detinue, for keeping or detaining them: but this is as Legatee, his own assent perfecting the Legacy.

The possession of one Executor is the pos-

possession of all the rest ; so, as if one appearing to a Sute, and the other making default, in whose hands all the goods be, which are not administred, if, I say, here he that appears, pleades that he hath nothing in his hands, this shall be found against him ; for whatsoever any of the Co-executors hath, he also hath, and is in his possession, and so shall the Creditor recover, and have judgement to be satisfied out of the Testators goods, as in his hands. And therefore if goods be taken from one, all may maintaine an Action of Trespasse thereupon ; for the possession of one, is the possession of all. But the possession of one shall not be so the possession of all, as to charge the others owne goods, whereof more elsewhere.

Where two Executors be made, the one making a Will and Executors, and dying ; if the other dye after Intestate ; now shall not the Executor of him who first dyed, be Executor to the first Testator, but he is dead Intestate ; because the surviving Executor is so dead ; and in him the Executorship was wholly and soly settled by the death of his fellow before him : So Administration *de bonis non administratis* shall be committed.

The

14. H. 4. 12.

Bra. 12.

F

All must sue, 19. H. 6.

65. 1007. 24.

E. 3. 40. and

48. B. 3. 26.

It may be in his name

only from whom taken,

nor need be be named

Executor. Bra.

Exc. 31. 39.

H. 6. 45.

F

G

32. H. 8. Bra.

Exc. 149.

39. H. 6. 45.

Co. lib. 5 f

97

H

Chapman
& Daltons
safe, Plow.Sir Edward
Phitons
case, Co. lib.
2. f. 80

So where
the Stat. of
17. 1. gives
time for
proofe to
him whose
goods were
wrested, his
Executors
may do it;
if he die be-
fore the
time.
Co. l. 1. 107b
Co. lib. 6 f
80

The Executors or Executor, if but one, so represents the person of his Testator, that he is in Law his Assignee by the very making of him Executor; so as if one covenant to make a Lease to *I S* and his Assignes by such a time, and *I S* dieth before that time, and before the Lease made, now must the Lease be made to his Executors as his Assignee, representing his person; so also in a condition to pay to the Feoffor or his Assignee: yet a Lease to *A* and his Assignes during the life of *B*, shall not go to the Executors of *A*. So where in a general pardon by Parliament, there is an exception of persons outlawed after judgement, the person so out-lawed shall satisfy the Creditor, who hath out-lawed him. If the Out-law die before this done, his Executor, as representing his person, may make satisfaction, and so make the benefit of the pardon to extend to his Testator, for saving his goods, as if himself had satisfied his Creditor, though he left him unsatisfied, when he left the world, *et diem obit extremum*. Yet where *A* sold Land to *B* upon *Proviso*, that if he payed to *B* his Heirs or Assignes &c. *B* died, *A* payed at the day to his Execu-
tor,

tor, and it was doubted that it was not good, for the word Assignee could not reach to him being no Assignee of the Land; and where the Executor brought an Action of account upon a receipt by the hands of the Testator, the Defendant could not be admitted to wage his Law; for that this was held a receipt *per antequam*; yet it is clear, that if one by Bond or Covenant tye himself to pay such a summe at such a day, not mentioning his Executor at all; yet is the Executor bound, as included in the name or person of the Testator. And where the Statute 23 of Hen. 8. gives the Writ of attaint (in the course there mentioned) against the party that had judgement, it lieth against his Executors if he be dead; but thereof another reason is given: where a man was bound that he would not sue upon such a Bond, and hee died, and his Executor sued; this was held to be no forfeiture of the Bond. So where one was bound to pay ten pound within a month after request made to him, and he died before request; it sufficed not to make it to the Executor, as *Marrwood* said. It was likewise held that the warrant of Attorney put in for the

L. Plaintiffe

Also Executors may have restitution of stoln goods, and a writ of Error; yet the Statute speaks but of the party.

H
2 El. Dy.
180. Contre.
where to
pay to
the Feoffee
his Heir or
Assigne.
Co. lib. 5 f.
97 2 Eliz.
Dy. 183
3 Eliz. Dy.
201

H
27 H. 8. 16

M 15. 8. 16
Eliz.

I
34 El. vel
circiter Ti-
therly &
Lexcor.
Walth. in
ba. reg.

I
36 H. 8.
Bro. Rat.
Marchant
43

K
2 R. 3. 8
H I
15 H. 7. 14

F
15 E. 3. Re-
spond. i. com.
upon a stat.
Merchant

K
Conte Na.
br. 267 u-
on a Recog.

H
30 El. 207.
31 in ba.
reg.

Plaintiffe in debt, it sufficeth not for his
Executor to bring a *Scire facias* upon the
judgement. And if Executors sue exe-
cution upon a Statute in the name of a
Connsee, as if he were alive, this is void,
and they may sue out new extent, and
this they may do without any *Scire faci-*
as, as well as the Connsee might,
if he had been alive. But by *Hussley* Ju-
stice, if the Conusor in a Statute staple
be returned dead by the Sheriff upon the
extent; a *Scire facias* must be sued out
before extent proceed; and upon a judg-
ment had, if the recoverer die before
execution, his Executor cannot as him-
selfe might, sue out execution without
a *Scire Facias*, as is there said. Yet if af-
ter a *Capias ad sat.* awarded, the Plaintiff
die before it be executed, the Sheriffe
may proceed to the taking of the party,
and is not subject to any action of
false imprisonment; nay, if hee suffer
him to escape he is chargeable, as *temp.*
Elizabeth. it was resolved upon the mo-
tion of *Anderson*; but withall it was held
that relief might be by *Audita querela*.
Like resolution was in the Kings Bench,
after some doubt by *Wray*, and the o-
ther Judges, where the Defendant died
after

after a *Fieri facias* awarded, and before it was executed, that the Sheriffe might proceed upon the goods in the hands of the Executors.

But if the Defendant in an Action of debt upon a bond plead a tender at the time and place of payment, and tenders the money in Court, where it rests, and then he dies, now shall not the plaintiffe have this money, because the property thereof is changed, and become the Executors, as was held in the Common Pleas; but he is put to a new suite against the Executor. Yet where judgment is once given in a Writ of Partition, for a term, or in a Writ of Account, if the Plaintiffe die before the second judgment needful in both cases, the Executor is not put to a new suit; but may proceed by *Scire facias* upon the former judgment, as the Lord *Anderson* held upon the motion of *Fenner* Serjeant. Though before we found the Executor not in points penall, all one with the Testator, yet in point beneficiall, the Testator includes him in some cases; as where an Abbot granted to his Lessee to take Estovers in another ground, it was held, that his Executor though

3a El. vel
circiter.

I
Pas. 28 2
H

not named, should enjoy this, during the terme, as well as himself should have done. And whereas the Statute 23. of *Henry* the 8. gives costs to a Defendant against a Plaintiff, suing for a wrong, or breach of promise, or the like, done to the Plaintiff against whom it passeth by verdict or nonsuit; it hath beene resolved that an Executor suing upon such wrong, or breach of contract to his Testator made, should not pay costs, because he is another person then the Testator; and so is it usuall in experience. But if in such suit, the Attorney of the Executor misbehave himself towards him, and for this the Executor sueth him, here if it passe against him in manner as aforesaid, hee shall pay costs, because this was a suit for a wrong done to himself.

Trin. 36 El.
in ba. reg.
H M

Pa. 41 Eliz
in com. ba.

If *A* recover a debt as Executor of *I S.* and makes *B* his Executor, and dies before execution sued, *B* is not put to new suit, but may have execution upon that judgement: But if *A* or *B* died Intestate, now could none as Administrator to either of them, nor as Administrator of *I S.* have execution of this judgement; for the former hath no interest in

H
28 H 8

in any thing pertaining to *IS*, & the latter cometh to title above the judgment, *viz.* as immediate Administrator to *IS*, who is now dead intestate: and derives no title from the Executor who recovered.

If a Conusee have a Certificate into the Chancery, upon a Statute, and then dies before extent taken out, his Executor is put to a new Certificate, and for obtaining of it, must make Affidavit, that no extent hath yet been taken out. 1 Bl. Dy.
180
I

If an Alien joyne with his Wife, who is Executor in a suit for debt, and it cometh to Issue, he shall not have tryall *per medietatem alienig.* or *Lingua*, as should be if he otherwise were party to a triall, as was held in the case of Doctor *Julio*. Yet if a Noble man sue as Executor to another, not noble, hee shall for his non-suite be amerced five pound, as if he sued in his owne right, as was conceived 21 E. 4. 77. By the same rule & reason doubtlesse a Noble man sued as Executor, shall not be arrested, nor shall any *Capias* be awarded against him for not appearing. And if any trial shall be of any issue, there shall be two Knights

L 3

of

M

of the Jury, as in other cases where a Peere is party. Likewise where the Wife is to have her convenient apparel, whereof the Executor must not bereave her; If she be a Noble woman, it shall be answerable to her degree.

A
38 E. 3. f. 9
N

If one Executor only sell Goods of the Testator, he alone may maintaine an Action of debt for the money. So if goods be taken out of the possession of one Executor, he alone may maintaine an Action, and that without naming himselfe Executor.

P
O
3 H. 7.
I.
& 5 E. 2.
Fitz. bro.
80 2. Conte.
38 E. 3. 13
& 20 E. 3.
tir. account
78.

Some touch hath been before of Summons, and severance, whereabout be this added. If one Executor will not, or cannot joyne in suit with the other, so as he is summoned and severed, now by his death, after the suite is not abated, 16 Ed. 2. *Fitzh.* 111. yet if hee live till judgment, he may sue execution, say o-ther Books, 13 Ed. 3 *Fitzh. Exer.* 9. 11. R. 2. *Priviledge* 2. yet *Que.* of that, for he cannot acknowledge satisfaction, as hath been since resolved, *Mich.* 14. & 15. *Eliz.* Dy. 319. And the reason thereof being, because he is no party to the judgment, by the same reason can hee not sue execution upon it; for how can hee

he have execution for whom there is no judgement given? now the recovery is only in the name of the other Executor; yea, by the said last Booke, it seemes that after judgement had, he cannot release the debt, because it is now altered in nature, and turned in *rem judicatum*, though at any time before judgement he might have released it, as both that last booke saith, and the two precedent *temp. Ed. 3. Rich. 2.* yea in an Action of account, after judgement had, that the defendant shall account, the release of him severed, is a good discharge to the Defendant, as was resolved 48 *Ed. 3.* 14, 15. but this is not a plenary judgement, for nothing is recovered thereby, but another judgement is to be had after the account, which may be against the Plaintiffe, so as this release came before any debt or duty adjudged. What if the Defendant be had in execution at the suite of the Executor, who prosecutes it, and escapeth; whether may the severed Executor discharge the Sheriffe or Jaylor by a Release? I think hee may not.

By that above it is plain, that if any one of the Executors Plaintiffs die, the

2 H 4 E. 14

P
9 E. 4. 12
Bro. 34

Writ is abated, only where he so dying was before severed; opinions have beene different, as above appears. So also is it, if one of the Defendants Executors die. Yea, if the Plaintiffe Creditor sue *A B* and *C* as Executors, where only *A* and *B* are Executors, there by the death of *C* the Writ abates, or falls to the ground; yet *A* and *B* (as I think) might have pleaded in abatement, that they onely were Executors, traversing that *C* was not Executor: but the Booke doth not so resolve. See 46 E. 3. f. 9, 10.

A

As *A* and *B* above might admit that Writ against them and *C*. So if the Writ or Suite had beene against *A* only, and he so admit it, not pleading in abatement, the recovery against him alone is good. 9 E. 4. 12.

31 H 6. 30
M
21 E 4. 49
69 42 E 3
13, 14 H. 6
14, 15

One that is out-lawed or attainted in his own person, may yet sue as Executor, because this suit is in anothers right, viz. the Testators: But hee that is excommunicate cannot proceed in suite as Executor, because none can converse with him without being excommunicate, as a book sayes. Yet doth not this excommunication pleaded, abate or overthrow the

the shire, but make that the Defendant may stay from answering his suit untill the Plaintiff be absolved and discharged from his excommunication.

3 H. 6. 40
Littl. 44
Co. l. 81, 69
11 R. 2
Excom. 25.

CHAP. X.

Of the Possession of Executors, or their actuall having.

1. *What shall be said so to come to their hands, as to charge them.*
2. *What shall be such a getting or going from them as to excuse them.*

WE have before considered what things shall come to Executors, and being come, shall be set in their hands:

Now for that it is said in *Rydes Case* that an Executor shall not be charged with, or in respect of any other goods than those which come to his hands after his taking upon him the charge of the Executorship. Let us now examine what shall be said, and accounted such a full and compleat coming to the hands of Executors, as shall make them within the reach

Co. lib. 5

reach and charge of Creditors, and Legatees, viz. For the payment of debts and Legacies. As touching debts due to the Testator, it hath before been shewed, that until Judgement and execution had, they be not Assets in the Executors hands. Now then, as touching other goods or chattels possessory, which are of two kindes, viz. real, and personal, Let us put the case thus: The Testator at the time of his death hath a flock of Sheepe in *Cumberland*, Corne in the Barnes in *Cornwall*, Bullockes in *Wales*, fat Oxen in *Devonshire*; Money, Household-stuffe, and Plate in *London*, a Lease for yeares in *Norfolke*, and his Executor dwelt at *Coventry*, viz. farre from all these places; what kinde of possession shall the Law Judge this Executor to have in every of these, instantly upon the Testators death, and before he come where any of the things be, either to see or seize upon them? In all the particulars above mentioned, the Law is all one, except the Case of the Lease for yeares; which if it be of Land (as is most usual) then because it is a settled and immoveable thing, the Law doth not reach to it the foot of the Executor, to put

put him in actual possession, for (*Possessio est quasi pedis positio*) until himselfe, or some for him do actually enter thereupon. Nor indeed need the Law help or supply the want of actual possession in this Case, as in the Case of moveables: since Land cannot be carried away as goods may, and therefore is not subject to purloyning or imbeisment as moveables are. But if the Lease for yeares, were of Tythes, the Executor, though in never so remote a place from them, shall be instantly upon the setting out thereof in actual possession of them, so as he may maintaine an Action of Trespass against any stranger which shall take the Tythes set out, though he, nor any for him did ever before possess any of the said Tythes, or came neare unto them. But if the case were of a Lease for yeares of a Rectory, consisting not only of Tythes, but also of Glebe Lands, into which entry may be made, as also Liv-
 ry of seisin in it, then it may perhaps be some question, whether such an actual possession in Tythes, shall be given by the Law to an Executor, neglecting to enter, or not entring into the Glebe Land. And so I leave the consideration of Char-
 tels Real. Touch-

45 E 3. 17
 21 H 6. 43

2 R 4. 50
 Plow. com.
 287. 32
 H 6. 13. 14
 H 8. 22.

Touching things Personal, in which the Executor hath such an actual possession presently upon the Testators death, as that he may maintaine an Action of Trespasse against any stranger taking them away or spoyling them, though he nor any for him ever came neare them: whether yet this shall be such a possession in the Executors, and such a coming of these goods to their hands, as to charge them with payment of debts & Legacies, yea to make their owne goods liable, in stead of these, is a point worthy of consideration.

And doubtlesse, this thoroughly sifted, will prove a Case mischievous, whether way soever the Law be taken: for first, it must be admitted, that without the Executors laying his hands actually and particularly upon the Goods in the House or Fields of the Testator, whether the Executor hath resorted, he shall be said so in possession, as to stand lyable unto the Creditors, so far as they extend in value, though after others purloyne or imbesit them. Now then, if distance of place shall make difference, where shal be the bound and limit of that distance? & if the Executor may come after

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ter a strangers taking, or possessing of the goods, it is mischievous to Creditors.

On the other side, if it shall be laid upon the Executors to answer for all the goods whereof the Testator dyed possessed, it will be mischievous for them, and deterre them from taking Executorship upon them, since much purloyning may be even of money, Jewels, and Goods, by Servants and others, about the Testator, or where these things be. I thinke therefore, that if without any fraud, collusion, or voluntary conniving on the part of the Executors, they be prevented by others of laying hold on the Testators Goods, so as that they may dispose of them; especially, if it cannot be known by whom they are so purloyned, and imbeisled, or if they be persons fled, or insolvent, that then they shall not stand upon their score, as goods come to their hands, in respect whereof, Creditors or Legatees shall draw so much from them, even out of their owne Goods, as in other cases, where they have no such excuse.

And of this minde I the rather am, because I find the whole Realme in Parliament,

33 H 6. c. 1. Parliament, taking notice of such prevention of Executors, coming to the goods of their Testator, by the wrongful act and imbesilment of others, without any default in themselves. And in this Case the Parliament hath given special remedy, viz. that Writs shall be directed to Sheriffes, to make open Proclamation for the appearance of the parties delinquent in the Kings Bench, at the day limited, and in default thereof, they shall be attainted thereof felony, the Writ being returned executed, viz. Proclamation made. But note that this Proclam. is to be made two Market daies, within twelve dayes next after the delivery of the Writ, and the last Proclamation must be fifteen dayes before the day of appearance. And these Proclamations must be made in such Cities, Burrowes, or Places (saith the Statute) not expressing what is meant by the word *Such*, and therefore meaning doubtlesse those in which the act or offence is committed. So that if the fact be not committed within the limits of some Citie, Burrow, or Market Town, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market dayes, in the place where,

&c.

&c. Now besides other Places, even some Burrowes, viz. Townes, sending Burgessees to the Parliament, have no Markers, and so are no places within the Act. Also two Executors must require this Writ, therefore where there is but one Executor, no relief is given by this Law, for it is penal, making felony, and therefore shall not be extended by equity beyond the Words. Lastly, it extends but to the Executors of Lords and Persons of good degree, and onely to the Trespassing servants of such Persons, not to other strangers, purloyning the goods. But now who shall be said to be Persons of good degree, not being Lords, I will not much labour to decide; the rather because I have not heard, nor read, to my remembrance, of any Action brought upon this Statute; but I thinke that good degree must stay either at a Knight, being the lowest dignity, or at a Gentleman, being a degree of Worship, as elsewhere is shewed, and not stoope any lower.

And the said Statute seemes in some sort to imply an opinion this way, which I incline to, in that it expresseth this purloyning to be an impediment of the Execution

unction of the Will, whereas if the Executors shall answer and make good to Creditors and Legatees, out of their own state and goods, for these imbeziled, the execution of the Will is not hindered, but the Executors are damnified in their own private value: yet it may be said on the other side, that some things given in *specie* by the Will, such a piece of Plate, such a Furniture of a Bed or Chamber, such a Jewel may be purloyned, so that the Legatees can never have them, and consequently the Execution of the Will be hindered, though some recompence be made by the Executors: but how these Legatees shall recover recompence in such cases; for that Legacies are not to be recovered by Suite at the Common Law, I must leave to the Professors of the Common or civil Law to inform. But if the Executor be of secret assent to this imbezilment, whereof even the forbearance to sue for the recovery of the things, or the value of them in damages, if known where they or the imbezilers be, is a shrewd evidence or prooffe. Then shall the Executor be adjudged an haver of them, and so stand charged as having them, for *Pro possessore habetur qui dolo*

dele desist possidere. And if in any Case the taker by prevention from the Executor, before his knowledg (perhaps) of the Testators death, or at least, before his possibility of repair to the place where the goods were, to put them in sure Custody; if I say, such actor keepe these goods from falling upon the shoulders of the Executor, they shall surely fall upon himselfe, and make him chargeable at the Creditors suit, as an Executor of his owne wrong.

Of goods lost by, or gotten from Executors.

But put we the case (for thereunto shall be our next step.) that goods come fully into executors possession and hands, but be again lost or gotten from them without any default in them, shall they yet stand answerable out of their owne estates for them? Surely hereabout two distinctions must be made, as I take it.

The first whereof I derive from our learning touching escapes of persons taken in Execution and imprisoned, if such be rescued by Alien enemies, the Sheriff or Jaylor shall not answer out of his own Goods for this debt; otherwise,

33 H 6. i

16 E 4.2.3

7 Eliz. Dy.

241.

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if it be done by Subjects, against whom remedy is to be had by the course of Justice: and so should I think it to be touching Executors, viz. that if enemies landing (as neer the Sea Coast may easily, and often happen) shall take away Cattel, or goods from an Executor, hereby he shall be excused; contrariwise ordinarily, if the ereption or direption bee by Subjects knowne and thereby actionable. Another difference I shall think may probably bee taken from the rules of our learning, touching Bailment. If *A* deliver goods to *B* to keep as his owne, or generally, viz. without any special undertaking by *B* to keep them safely, and without any money or other valuable consideration, given for the safe custody; here, if *B* be robbed of them, he shall not make satisfaction to *A* for them; and so if they be stolne from a Servant or Factor. But if they be taken away by a known Trespasser, not feloniously; some opinion hath been, that the Keeper shall make recompence, because he hath remedy for recompence, or satisfaction from the Trespasser; yet of this latter I should doubt, because *A* himself as well as *B* may

Vide 29
Aff. p. 28.8
E 2 Fitz.
De. in. 59.9
E 4.90.13
H 7.4 Coli.
4 f.83.84

may have this Action for damages against the Trespasser. Now an Executor is of the nature of such one having the custody of another mans goods, and I have seene in a Manuscript entire, the Writ of Trespasse by the Executor, expressing goods of the Testator, in the Custody of the executor to be taken from him; therefore me thinks he should no otherwise be charged than B to whom goods were, as above is said, delivered to be kept. For the Executor haply shall have no benefit nor advantage by the Executorship, all the goods not sufficing perhaps to pay debts and Legacies, which is the state we most think of, viz. where goods want to pay debts and Legacies, for where there wants not, the question needs not be made. Yet a Servant or Factor, who hath wages for his service, is not thereby made liable to satisfaction for things in his custody stolne, because he hath not for this particular custody, any compensation; so of an executor, if perhaps benefit might accrue to him by the Executorship, as haply the discharge of a debt owing by himself &c. Other Cases there be, wherein the Executor will stand more clearly discharged As

In custodia
sua exist.

M 2

if

if the Testator left a Lease for years, state, by extent, wardship, or other goods, whereto he had but a defeasible title, and they be evicted after his death. So if he left a Ship at the Sea with much goods and Merchandises which are drowned in the returne, never ariving in safety.

So also if he left a flock of sheepe, tainted with the rot, which dye shortly after him, in none of these three Cases doubtesse shal the losse fall upon the Executor. But to put a Case of more doubt, what if a Lease for years come to an Executor, subject to a condition for payment of rent, or a summe in grosse, and the Executor failes in payment, whether shall this losse fall upon the Executor to be made good to Creditors, or Legatees out of his own substance, or not? To this I must answer by this distinction, *viz.* If the Executor had taken the profits of this Land so long as to furnish him with mony for this payment, or if he had other goods of his Testators in his hands to supply the payment, then is it his default that the money is not payed, and he must bear the smart thereof, otherwise not; for he is not bound to make payment out of his own goods, yet

yet he is a fullen and unkind Executor who will not so doe, when as he may *Yet Quare.* repay and satisfie himself by the profits thereof after. Like Law, if the Executor suffer a bond of a hundred pound to be forfeit for not paying of fifty pound, having sufficient in his hands. So also of a Recognizance, Statute, or Judgement, defeasanzed upon payment of a lesse summe; yea, I lesse doubt of all these Cases, then of the forfeiture of the Lease for years; for haply the Executor had time to have sold the Lease, and made mony thereof, towards the payment of Debts, the omission and neglect whereof may be imputed unto him as a default justly occasioning recompence to be by the Law required from him. But perhaps he may excuse himself that he could not find a Chapman who would give him to the value thereof: hereunto yet reason can easily reply, that it had been much better to have sold it under the value, then to have lost the whole value, by exposing or abandoning it to a totall forfeiture.

CHAP. XI.

How farre, and where an Executor having Assets, is chargeable or liable to Action.

HAVING considered what things shall come to Executors and be Assets in their hands, for the performance of the Will; Let us now consider what things the Executor is bound to pay, satisfie, or perform, and what not; where hee is chargeable, and where not; this being admitted, that he hath Assets, viz. sufficient wherewith to perform.

Here we will consider of these parts.

1. *Of debts by Specialty or Record.*
2. *Debts or duties by contract without Specialty.*
3. *Debts without either contract or Specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

TOUCHING Debts by Specialty, which are the most usuall and common oblige-

obligements, it wil not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The most doubt will arise upon Bills, and such Writings Obligatory, made, not by Scriveners nor Clarks, in common forme, but by others, otherwise for haste, or through simplicity. Thus, long since we finde a Writing made by *A* to *B*. *Memorand*. that I have received of *B* ten pound, which I promise to pay, &c. This being sealed and delivered, ^{22 E. 4. 22} was held a good Obligation by *Brian* and *Catesby*. So if the words had beene only, I shall pay to *B* ten pound; whether if such words or the like, as Covenant, or Grant to pay, be in the forme of a Bill or Bond, or in an Indenture or Articles, it is a sufficient ground for an Action of debt. And though it should be miswritten, *vigint*. for *vigint*. or fitteene for fitteene, yet shall it be favourably confirmed, and held a good specialty of debt, as hath been resolved in these and like ^{12 R. 3. F. Dec. 166. 9 H. 6. 7. 2 H. 4. 8. 23 El. M. 5} cases; and so also notwithstanding false Latine in the Obligation, or the plurall ^{9 H. 7. 16. 2 H. 4. 8} number for the singular number, or words of repugnancy or non-sense, yet if there be words whereby it appears

M 4

that

38 H 8
Dyer 22

38 H 8. Dy.

19 & 22
40 E 3. 1

7 H 7. 14

8 H 6. 36

32 H 6. 15

31 E 4. 81

3 H 4. 17

11 H 4. 76

that *A* is a Debtor to *B*. and it be sealed and delivered, it is a good writing Obligatory; yea, though it want the words of conclusion, *viz.* In witnesse whereof, as the Lord *Dyer* reports to have been resolved; although the contrary were held in four several Kings times before, as our Books shew. Now any such Writing Obligatory doth determine or drown any duty by Contract, because specialty is of a higher nature: So as if *A* and *B* doe bargain with *C* to pay him a hundred pound for Corne or other thing, and after *C* take some such Writing Obligatory, as aforesaid of *A*. Now by this is *B* discharged of the debt, because he stood charged onely by the Contract, which is extinguished by the said Specialty.

So reservation of rent, grant of annuity.

28 H 8
Dy. 14 & 22

47 E. 3. 22

32 H 6. 32

10 H 7. 18

As for the extent and operation of these Specialties, to, and upon Executors, we must know that an Executor doth so represent the person of the Testator, and is so included in him, as that every Bond or Covenant by the Testator made for payment of mony, or the like, reacheth to the Executor, although he be not named, *viz.* that hee doth not Covenant for, nor binde him and his Executors

Executors by expresse words (and yet the heir not named is not bound, though there be never so great Assets, or Land descend unto him.)

No mention of Executor in the judgment, yet he charged.

Now touching debts upon Record, much need not to be said, (except of those by Statute Merchant) for to debts and damages already recovered against the Testator, and to debts by Recognizance the Executors liableness is somewhat clear and conspicuous. Yet other inferior debts upon Record, may fitly be thought of as issues forfeited, fines, imposed by Justices, at *Westm.* or at Assizes, Quarter Sessions, Commissions of Sewers of Bankrupts, by Stewards in Leets, or the like; for all these are debts of Record, which Executors stand charged withall. So also if the Testator were before Auditors found in Arrerages of Account, being a Bailiffe or receiver: For these Auditors are by Statute, Judges of Record, but if the Account were made onely before the party to whom the Arrerage pertained, or but before one Auditor only, it is out of the Statute, which speaks of Accounts before Auditors in the Plural number. Therefore the Executor not chargeable, because the

9 H 6. f. 11
11 H 4. 64
92 Other-
wise of a
Garden in
Soccage, he
is out of
the stat. w.
2 cap. 11. ut
credo Co. li.
10. 103

the Testator might wage his Law in those cases, not in the former.

36 H 8 Br.
Stat. Mer. 43

And whereas exception was before made of a debt by Statute Merchant, it was by reason that the Lord *Broke* tells us that if the Conusor in that case be returned dead, no remedy appeareth for the Consee to have execution of the goods of the Conusor, but onely of his Lands. If this should be thus, it were a very mischievous case: for many bound in Statutes have no Lands but Leases, and goods of great value, and if by their death their goods and Chattels should be set free from this Statute, and the Creditor without remedy, the Law were defective: and it were so much the more strange in this Case, because the Statutes of *Alton*, *Burnell*, and *Mercatoribus*, seem to pitch principally upon Goods, and to tend unto assurance between Merchants who usually are not Landed men. But that the Law doth give remedy in such Case, as well against the goods as Lands of the deceased Conusor, appears by the resolution of late made, in what Order and Precedence Statutes are to be satisfied by Executors, as after we shall see.

of

*Of Debts by contract without Deed, as
Leases Parol, &c.*

Contracts are of divers kindes, and we will begin with those in the realty, as most worthy. If therefore one be Lessee for yeares, or for life, without any Indenture or Deed, (as he may be) and his Rent being behind, he dyeth; now is the Executor lyable to the payment of this Rent, without any Specialty, for that his Testator, if he had been sued in his life time, could not have waged his Law. But if the Lessee for yeares in his life time sell or grant away his terme or Lease, although he still lye at the stake for the Rent, to grow due after, until the Lessor accept the Assignee for his Tenant; yet if the Lessee dye, his Executor shall not be charged for any Rent due after the death of his Testator. But what if the Lessee doe not alien or assigne his terme, but dye thereof possessed, and the Executor perceiving the Land not to be worth the Rent, waiveth the same, yet the Lessor will not enter thereinto, nor intermeddle therewith; whether may he yet charge the Executor with the Rent,

21 H. 6. 1
44 E. 343

44 E. 3. 5
7 E. 3. 11
14 H. 7. 4
per Kebble
vide 8 E.
Dy. 247.

M. 32. &
33 E. 10. in
com. ba.

Do. & Spu.
121.

Rent, during the terme? I answer, that if he have Assets, that is, sufficient for payment of this and other debts, he cannot waive this Lease, but shall be tyed to answer this rent, though much more than the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay mony; Yet because it is yearly Executory, the Executor may waive it, in case his Testators estate will not supply and beare that losse. But what if there be Assets to bear this yearly losse for some yeares, but not during the whole terme? I thinke in this case the Executor must pay the Rent, so long as this Assets will hold out, and then must waive the possession, giving notice to the Reversioner; and this I thinke hee may doe well enough, notwithstanding his Occupation of the Land divers yeares after the Testatos death, because that was not voluntary, but as of necessity; yet this I leave as a *Quere*, to be well advised of with good counsel.

Of Contracts Personal.

WHere the Testator might wage his Law, there the Action lyeth not against

against the Executor, as hath beene touched: and therefore he is not chargeable in an Action of debt upon a simple contract, as by reason of this or that to his Testator; yea though it were the Inheritance of Land which was sold, so as the sale were without Deed; or though by Deed, yet if no counterpart were under the hand of him to whom the sale was made. And the custome of London, to the contrary, viz. that an Action of debt should be maintained against Executors upon a contract, was held void, at least no good plea against other Creditors, that such a debt was recovered against the Executor, or paid by him, as was towards the latter end of the late Q. time resolved, though in the beginning of her time, it was a demurrer. Yea, though such a debt grew for the most necessary thing, viz. meat and drinke, which bindeth even an Infant to payment, yet will it not charge the Executor of a man of full age: but this is meant where the contract was only by word; for where the Testator putteth his seale to any deed or writing made upon such sale, this is more than a simple contract, & taketh from the Vendee his wager of Law, and so chargeth the

41 E 3.13
15 E 4.25
Except by a
Quo minus
in the Ex-
chequer, for
the Kings
debtor. Co. L
9 f. 98. a. So
of accounts,
except for
the King.

M. 23. b.
33 El. in
com. 6a. By
three Judges,
and 37
El. By all,
as I finde in
my report,
but Co. 11. f.
f. 82. b. It is
contrarily
reported.
3 El. Dy.
196. De-
murrer.
9 B4. 51
10 H 7. 8
15 E 4 16
21 H 6. 13
39 H 6. 186.

There
though a
common
hostler, or
victualler
trust his
guest, he lo-
seth his debt
by his death
Ca. 87. 4
12 H. 4. 28
But if the
sum be also
written on
it, they are
bound as
by a Deed
28 H. 4
Di. 23. 4
Slades case.
Co. lib. 4
Ca. 19. 87
Pinchons
Case

the Executor. But if the Testator seale but unto a taylor or tally, with scotches, expressing a debt, this is no such Specialty as shall charge Executors. Yet in some Cases without any seale at all, the Executor is chargeable. But although no Action of debt lyeth against the Executor upon such a simple Contract, yet may the Creditor in that case, maintaine an Action upon the case, grounded upon the assumption implied, though not expressed, as now standeth resolved by all the Judges of all the Courts at *Westminster*, though heretofore there hath beene much difference of opinion thereabout: And indeed thus the Executor is charged, in matter for a simple Contract, though not in manner of a Debt, but as for breach of promise, making recompence in damages in stead of the debt. And the chief reason for it, is because the Testator could not have waged his Law in this Action upon the case against himselfe, though in debt he might. Where the Testator retaineth servants in Husbandry, or otherwise, and dyeth, there being wages due to these so retained, the Executor is liable to an Action of debt for the same, by

by reason that the parties were compellable by Statute, thus to serve, and therefore the Testator could not have waged his Law; but in case of Servants not compellable, as Waiters or Servingmen, as we call them, no action of debt lyeth against the Executor for their wages, though against the Testator himselfe it doth: for the Contract is sufficient to charge him who made it. See of account after.

4 H 6. 16

11 H 6. 48

So 2 H 4. f.

14 Servitors in the

warre by

contract.

Where Executors shall be charged without either Contract or Specialty.

WHere a Prisoner oweth money to a Jaylour, or Keeper of Prison for his dyet, or victuals, and dyeth, his Executors shall be chargeable for this debt, because it is for the Commonwealth to have Prisoners kept, which cannot be without affording them victuals. Also, where one hath a Patent, or Tally of the Exchequer, to receive money of some Custosier, Receiver, or other Officer of the Crowne, and delivereth it to him, he then having money of the Kings in his hands, if he pay not the same, but dye, his Executors shall stand char-

27 H 6. 4

15 E 4. 16

Co. lib. 9. f

87. b.

No. u. br.

121 a. He

must have a

liberate also.

27 H 6.4 b
1 H 7.17
2 H 7.8.9
Clark of
the Hamper
10 H 6.24.25

No. na. br.
82, 83
Westmin. 1
c. 35.
Lib. Intr.
97 a b.

Reg. orig.
141 a

11 R 2.16
P 2

chargeable with the payment thereof. So for Arrerages of Account before Auditors, if more then one; but this is debt of Record in Law.

So if any Lord of free Tenants, doth levy aid of them for the marriage of his eldest daughter, and he die before she be married, she may recover this money by an Action of debt against his Executor, but this is by vertue of a Statute. There is a President in the Book of Entries, of an Action of debt against the Executor of an Heir, by which it seems that a man binding himself and his Heirs, and leaving Assers, the Heir taking the profit, becomes so a Debtor, that his Executor shall be charged. And in the Register there is a Writ against the Executors of the Guardian of the Spiritualities of the Arch-Bishop of Yorke, for the debt of B who died Intestate, and whose goods came to the hand of the said Guardian, viz. the Dean of Yorke. In allowance whereof, there is a note added of the like writ, brought in K. R. 2. his time, and that then a president was alledged of such a Writ in King Ed. 2. his time, against the Executors of an Ordinary, and that they were inforced

to

to answer unto it. So is the opinion of *Trew* in the time of *Edward* the third. But *Ald.* opposeth him. Also the *Rationabile parte bonorum*, by custome in some places is maintainable for the Wife and Children, against the Executor. But no action of account lyeth against Executors, except for the King. More hereof, *tit. Wrong*.

11 E. 4. Fit.
Ex. 77.
See Co. lib.
Intr. 564.
such Action
in Yorke-
shire;

Of Covenants charging Executors.

WE have already touched upon Covenants in part, *viz.* where they be expressly for payment of money, shewing them to be in Law bonds, that is, Writings Obligatory, whereupon an action of debt may be brought, as well as an Action of Covenant, though the words of the Deed bear the sound and phrase of a Covenant. Yet in some Cases no action of debt lieth upon a Covenant to pay money: as if *A* covenant, that his Executor shall within a year or such a time after his death, pay ten pound to *B* now for that no Action or Debt was maintainable against *A* himselfe, it lieth not against his Executor, but onely an Action of Covenant, as was held in the late

Inter Andrewes &
Elserigge
circiter
33 Eliz.

Par. 33 Eli.
inter Bor. &
Austin. in
com. bar.

N

Queenes

Qu. if both be to be done by the covenanter, viz. ten l. if not five such a day. So in *Penals Case*. But where the Lessor did Covenant to pay the quit-rent, divers Justices thought the Executor not named was not bound, 1. & 2 P & M Dy. 114. Now the Case is *supra* in marg. Pal. 38 El. in ba. reg.

Queens time. So if the Covenant be conditional, as thus, that if C doe not pay to B ten pound, then A will pay it: and so also perhaps, if the Covenant be in the distinctive, viz. to doe such an act or to pay ten pound, now if the act be not done, yet no action of debt lieth for the money, but only an action of Covenant. But now let us come to the Cases of meer Covenants, and see which of them will charge an Executor, and which not. If a Lessee for years covenants to repair the buildings, or to pay the Quit-rents issuing out of the Land let, there is little doubt, but the Executor to whom the terme cometh, must as well as his Testator, performe that Covenant, although he did not Covenant for him and his Executors: and yet of these cases doubt hath been; and touching the latter, viz. of paying Quit-rents, divers Justices in *Qu. Maries* time, were of opinion that it was a thing so personall, that it died with the person, and did not charge the Executors; Nor is there any contrary opinion expressed in the Book. And since that time, viz. towards the end of *Queene Elizabeths* Reign, in the Action of Covenant between the Dean and Canons of *Windsor*

Windsor, and Hyde, touching reparations, at the first, much opinion was, that only the person Covenanting was tied to this performance, but after it was resolved that that Covenant did run with the estate, and so both Executor and Assignee bound to performance; but in that case it was said by *Rapham* Chief Justice, that if the Covenant had been to do a Collateral act; neither the Executor nor the Assignee had been tied thereby; and therefore where a Lessee for years covenants within such a time to build a new house upon the land; and dies before that time expired; I doubt whether the Executor be bound to perform this, or not; although it do concern the Land let, so as perhaps the Rent or Fine was the less in respect of this change of new structure or building, which is a great reason that the Executor, though not named, should be tied to the performance. But if the Covenant had been to build a house elsewhere then upon the land let, or to do any other collateral thing, not pertinent to the Land let, it is clear the Executors were not bound to perform it: and yet in those cases, if there were a breach or non-performance in the Testators life time,

Col. 5. f. 34

Resolved
P. 39 Eliz.
but not adjudged till
M. 43 & 44
Eliz.

Tr. 28 H 8
Dy. 14.
There the
house was
to be built
upon the
Land lea-
sed, and yet
Baldus seem-
ed of a
contrary
opinion.

M 8 & 9
El. Dy. 257
Intrat. M 7
& 8 Eliz.
rot. 11. 37
Swanne Vess.
Strangham
& *Starves.*

as that the time of performance were ex-
pired before his death, then it is cleare
the Executors were bound to yeild re-
compence by way of damages recovera-
ble in an action of Covenant, as both
Shelley and *Fitzherbert* agreed, and so
also did the Lord *Popham* agree in the
said case of *Hide*, as I find in my owne
Report of that Case, though in the Lord
Cooke reporting only the point in questi-
on, that be not mentioned. Now let
us consider of the case, where there is no
express Covenant at all, so much as for the
Lessor himself, but onely a Covenant
implied, or Covenant in Law, as we call
it. As if Lessee for life, make a Lease
for yeares, and die within the terme, so
as the Lessee is evicted by him in reverfi-
on, or remainder. In this case it was re-
solved in the late Queens time, by three
Justices, viz. *Walsb*, *Brown* and *Dyer*, that
by this Covenant in Law, the Executors
were not chargeable; and in the same
case the Lord *Dyer* sets down another
resolution after, to the same effect: but
Master Serjeant *Bendloes* reporting this
latter case to be of a Lease made by Te-
nant in tail, viz. before the Stat. of 32 H. 8
or not warrantable by it, sets downe the

the opinion contrarily, viz. that the action was maintainable against the Executor. This may serve for instance, the like being in any other case, where the Lessor hath not a good and a firme title, but perhaps subject to a Condition or other eviction, so as the Lessee cannot enjoy the Land according to his Lease. But this must be so understood, that no eviction, or breach of Covenant, is in the life of the Testator himselfe, for if that be, there is no question but the Executor stands chargeable; and therefore if one make a Lease of Land by Deed, wherein he hath nothing; this Covenant is perhaps presently broken, and though the Lessor die before an action of covenant brought it will be maintainable against his Executor, though no expresse Covenant. This is usefull to be known, though in these daies there be few leases so made, without expresse Covenant, and the Executors also named. And where there is a speciall Covenant in expresse words, it doth qualifie the Covenant implied, so as although words of demise and grant tie the Lessor to a general warranty of the title against all men, yet it being after Covenanted, that the Lessee shall enjoy against the

Tr. 12 El. rot.
459 inter
Broderidge
& Wandior.

Notes and
Anders case.

Lessor and his Heirs, or against all claiming under him or his Ancestors; Now no eviction by or under any other title, giveth cause of Action, or bindeth the Lessor or his Executor to make recompence.

Of wrongs done by Testators, and whether Executors be liable to amends.

Although Executors doe represent the persons of their Testators, yet if the Testator commit any trespass upon the goods of another, or upon his person or Lands, no action lyeth for this against the Executor, for *Actio personarum moritur cum persona*; So if a Sheriff, Jaylor, or keeper of Prison, suffer one in execution for debt or damages to escape, though hereby the party, at whose suite the Execution was, be intituled to an Action, viz. an action upon the case against such Officer, by the Common Law, and by Statute an action of debt; yet if he so suffering die for that such sufferance was a wrong of the nature of a trespassse, no action lieth against his Executor for the same. And upon the same reason, as I presume, if one carry away his Corn and Hay without setting out the Tenth, although the

41 Ass. p.
15-40 B 3
Fitz. Ex. 74
Co. lib. 9. f.
87 a.

the treble value be recoverable against him, in an action of debt, yet if he die before such recovery, the Action is gone, and lieth not against his Executor; No not although the Testator were a Lessee for yeares, so as his state came to his Executor.

Like Law in other penal Statutes, as for arresting one at the suite of *IS* without his privity or assent; Or for not appearing as a Witnesse, being served with a *sub pœna*, and having charges rendered, and many like; yea, if a Lessee for yeares commit waste and die, no action lieth against the Executor for this waste; for all these cases are within the rule of *Actio personalis moritur cum persona*, and many other like Cases might be put, but these may suffice. Yet if a Parson, Vicar, or other Spirituall or Ecclesiasticall person do suffer a ruine or decay of the houses or buildings upon his such spiritual benefice or promotion, and dieth, his Executors are liable, by the Spirituall or Ecclesiasticall Law, to the successors suite for amends to the repairing of such spoil or decay. And because some used fraudulently to grant away their goods, so as nothing shall be left to their Executors,

it was enacted *temp. Elizabethi*, that such Grantees of Goods should be liable to the successors suit, for these *dilapidations*, as if they were Executors.

As for one other case of this nature, *viz.* where an Executor wasteth the goods of his Testator, or an Administrator of the goods of his Intestate, and dieth; Whether his Executor be subject to Action for this or not: I adjourn the Reader to that place where I shall treat of such wasting, or devastation by Executors.

Unto this head, not unfitly, may be referred, what before is said of Actions against the Executors of the Debtors heir, and the Executors of the Ordinary, for the Specialty binding to payment, reacheth not to any of these; but because their Testators should have payed these debts, with the goods or profits of the Lands of the Debtor, and did not, but retained them to themselves; therefore for this as a wrong, are they suable, as I take it. So also by the same reason are the executors of an Administrator chargeable where he did neither pay the debts, nor leave the goods to the next Administrator, but otherwise disposed of them. Yet an Executor is not chargeable in an action

I conceive
no difference
between this
and the other
cases,
supra.

Fitz. Ex. 77

tion of *Detinue*, nor of account (except to the King) for the Testators detaining, not paying or answering things received, or under his charge.

And the Reason why, after account made before Auditors, and the Bailiffe, or receiver be found in Arrerages and die, that in this case his Executor is chargeable, is, because the Auditors are made Judges by the Statute, *Westm. 2. cap. 17.* so this Arrerage which they have judged, is a debt by Record.

But if the case be put on the other side, viz. that the Bailiffe, or Receiver, have found in surplusage upon his Account, viz. that he hath laid out more in his Lords or Masters businesse, then his receipts amounted unto, and then his Lord or Master dieth, now shal not be have any action against the Executors, for the surplusage, because it is out of the purview of the said Statute.

2 H 4. 13¹
He may by
admir. Co. l.
11 f. 88
3 H 6. 35
Con. for Ar-
rerages of
an account
before au-
ditors 11
H 5. 64. 91
92. 9 H 6. 11
13 Ed. 1

Col. lib. 9. f.
87 a.

CHAP.

CHAP. XII.

Of the Order and method to be used by Executors in payment of debts and Legacies, so as to escape a devastation or charging of their own goods.

WE have gone through and dispatched the two first proposed parts, viz. 1. Touching the being of Executors, and the manner of their being. 2. Their having, and the manner of their having. We come now to the third part, viz. their doing or disposing of the Testators estate.

Now this consists principally in the issuing of money, though partly also in delivering or assenting to the execution of Legacies, not being money but other goods or Chattels bequeathed.

Money is to be issued by Executors, foure wayes ordinarily.

About the funeral of the Testator.

About proving his Will.

In paying of debts.

In paying and satisfying of Legacies pecuniary.

As

As for the first, burialls be as of necessity, for two respects, viz. 1. Of charity to the dead, that he may be Christianly and seemingly interred. 2. To prevent and avoid annoyance to the living, who by the very view of dead carcases, would both be affrighted, and within a few dayes distasted at the nose. We know that under the Law, the touching of a dead carcase made a man uncleane and to need purifying: nor can we easily forget what the sisters of *Lazarus* said to our Saviour touching their brother, when he had beene dead three or four dayes: viz. that the taking of him then out of his grave must needs bring a noy-some savour. Heresabout therefore, some expence is necessary, and that not onely for fees to be paid, which in *London* amounts to a considerable summe, specially for such as are to be buried within the Church, but also otherwise, viz. for the Pall or Herse-cloath, the ringing, &c. As for feasting, and banqueting, it seems not to me congruent to the sadnesse and dolefulnesse of the action in hand. But howsoever that be, yet where the Testator leaves not sufficient goods to pay his debts, festiual expence is to be forborne,

ex-

except the Executor will out of kinde-
nesse beare it with his owne purse; for
dead debtors must not feast to make
their living creditors fast. I mentioned a
considerable amount of funeral fees pay-
able in *London*, and surely (to let my
thoughts fall back upon it a little) it is
worth consideration, whether in that
kinde, and especially for those who dy-
ing there, are yet carried into their coun-
tries to be buried, the exaction be not ei-
ther unjust altogether, or too onerously
excessive: so also for much ringing contra-
ry to the Canon made at the Convoca-
tion in the first yeare of King *James*.

The next thing mentioned to justifie
and occasion expence, is the proving of
the Will: But this way a greater dis-
bursement (except for riding charges, or
by reason of opposition by a caveat put in
or the like) will not stand allowable then
is prescribed by the Statute made in the
time of *Hen. 8.* whereby the fees of Ordi-
naries; and their Scribes, Registers, and
Officers be limited. And it is strange that
these bounds have beene so much and so
frequently broken and transgressed; the
rather, for that long before in the time of
K. Ed. 3. by an Act of Parliameat, it is
pro-

21 Hen. 8
cap. 5

13 Ed. 3. c. 4

-X2

provided that the Kings Justices should as well at the Kings suit, as at the parties grieved, enquire after such oppressions, or extortions, for so they be called; yea St. Germ. who was no stranger to the civil and cannon Law, as appears by his book saith that the Ordinary ought to take nothing for the probate, if the goods suffice not for funeral and debts; but he means only that conscience is against it.

Do. & Sci.
li. 2. cap. 10

Now we come to the third occasion of disbursement, viz. payment of debts, which is the maine part of our businesse. We have before seene what debts lye upon Executors, having assets to pay them; we are now to see in what order they must pay them, as well *Ut sine fide dispensatores*, as for their owne indemnity, *ne quid res sua capiat detrimenti*. To put our selves into the better order or method of handling these things, we will sort out debts into their severall kinds thus.

They are of these three sorts, viz. either,
Debts of or upon record.

Or debts by specialty.

Or debts without specialty.

The debts upon record may be againe divided into foure sorts or kinds, viz.

Debts to the King or the Crowne,

Debts

Debts by judgement or recovery in some Court of record.

Debts by recognizance.

Debts by statute staple, or statute merchant.

Amongst these, the debts of the Crown are to have the first place of precedence, so as if there be not come to the Executor goods of greater value then will suffice for the satisfaction of these, he is not to pay any debt to a subject; and if he be sued for any such, he may plead in Barre of this suit that his Testator died thus much indebted to the King, shewing how, &c. and that he hath not goods surmounting the value of that debt. Or if the subjects pursuit be not so by way of action, as that the Executor hath day in Court to plead, but be by way of suing execution, as upon statute merchant, or staple, then is the Executor put to his *audita querela*, wherein he must set forth this matter. And there is great reason why the Kings debts should thus be preferred before any subjects, *viz.* for that the treasure Royal is not onely for sustentation and maintaining of the Kings household, but also for publick services, as the warres, &c. as appears by the statute,

M 33 & 34
Eliz. the
Lady Wat.
Jugens case
in com. ba.
& Tr. 39. E.

tute, 10. *Rich. 2. cap. 1.* And therefore it is, as I conceive, that *Blacken* saith of the treasures or revenues Royal, *Roborant coronam*, they do strengthen or uphold the Crowne. And for the like reason, as I thinke, did God inact touching the possessions of the Crowne, that if they were given to any other then the Kings owne Children, they should revert and come back to the Crowne the next Jubilee, which was once in fifty yeares, *sed de hoc satis*. But this priority of payment of the Kings debt before the debt of any subject, is to be understood only of debts by or upon record due to the King, and not of other debts. If any aske how the King should have any debts which shall not be of record, since by the statute 33. of King *Hen. 8. cap. 30.* it is inacted that all Obligations and Specialties taken to the use of the King shall be of the same nature as a statute staple: To this I answer, that there may be summes of money due to the King upon wood-sales, or sales of Tinne, or other his minnerals, for which no Specialty is given; so also of amercements in his Courts Baron, or Courts of his Honours, which be not Courts of record: The like of fines

Lib. 1.

21 E. 4. 1r
22 So must
it be plead-
ed M. 33 &
34 Eliz.

Summe
of money
due to the
King upon
wood-sales
or sales of
Tinne, or
other his
minnerals,
for which
no Specialty
is given;
so also of
amercements
in his Courts
Baron, or
Courts of his
Honours, which
be not Courts
of record: The
like of fines

lines for copyhold states there. So of the money for which strays within the Kings Manors or Liberties are sold. Also as the Law hath lately beene taken and ruled in the Exchequer, even debts by contract due to any subject, are by his outlawry or attainder forfeitable to the Crowne. Yet neither these nor those due to such person outlawed or attainted by bond, bill, or for arrearage of rent upon lease is or can be any debt of record until office thereupon found; for although the outlawry or attainder be upon record, yet doth it not appeare by any record before office found that any such debt was due to the person outlawed or attainted. Thus are not these debts to the Crowne to have priority of payment before the subjects debts, though the Kings debts of record are so to have, so that if a subject to whom the Testator was indebted by specialty sue for this debt, the Executor must plead that the Testator dyed indebted thus much to the King by record, more then which he left not goods to satisfy; if the truth of the case be so, for if there be sufficient to satisfy both, then the subject creditor is not to stay for his debt till the Kings debt

And must
plead the
record in
certaine as
was held in
the case of
the Lady
Walsingham
M 33. & 34
Eliz. but it
sufficeth to
say, by a re-
cord of the
Exchequer
as was held
Tr. 39 Eliz.
in ban. reg.

debt be levied. And if the subject creditor sue execution upon a statute, so that the executor hath no day in Court to plead this debt to the King, then is the executor put to an *audita querela*, wherein he must set forth that matter, and so provide for his owne indemnity. But what shall we say of arrerages of rent due to the King? surely, where it is a fee-farme rent, or other rent of inheritance, I see not how it can come under the title of debt, since for it no action of debt is maintainable so long as the state continueth in him to whom it grew due; and I find that the *Lo. Dyer*, *M. 14. Eliz.* said, that the King could but only distraine for his rents, and not otherwise levy them of lands or goods; and that the King by his Prerogative may distraine in any other lands of his tenane, our books tell us, but no more; yet I know it hath been otherwise done of late in the Exchequer, which if it have been the ancient and frequent use of the Exchequer, it wil stand as law, though unknown to the *Lo. Dyer*. Now rent upon a lease for years differeth from the other, since for the arrerages thereof an action of debt lieth, but how can either of these be debts of record, when the nonpayment may

FINIS

O

be

be either in the Court of Exchequer, or to the receiver general or particular? and how then can there be any certain record of the not payment, so as to make any certain debt upon record? We know statutes have been made to make the lands of receivers subject to sale for satisfaction to the Crowne; and besides that, some ancient Patents direct the payment of Fee-farms into the hands of Sheriffs, the statute of *W. 1. cap. 19.* provides remedy for the King against Sheriffs not answering the debts of the Crowne by them received: so as the Kings Farmer or debtor may have paid his rent or other debt, and the Crown have not yet received it. Of fines and amerciaments in the Kings Courts of Record, there is no doubt but they are debts of Record.

Come we now to the debts of subjects, and first those of Record; touching which, I shall not be able to hold so good a method, and so well to handle things by part as I would, for that the parts so stand in competition one with another for precedencie, as that they must of necessity thereabout conflict and interplead one with the other, and contrast one against the other: yet for the Readers

ders better ease and ability to find out that which may concern him in his particular case, I will in the best sort I can, single out these things into several parts, and place them in several rooms or stations. First, considering how it shall stand between one judgment and another had either against the Executor or Testator. Secondly, how between judgments and statutes or recognizances. Thirdly, how between recognizances and statutes. Fourthly, how between one recognizance and another. Fifthly, how between one statute and another, adding to each some observations incident.

Now next to the debts of the Crown are judgements or debts recovered against the Testator, to have priority or precedency in payment, as being of an higher nature, or more dignity than any other, for that statutes and recognizances, though they make debts upon record, yet are they begotten but by voluntary consent of parties; whereas in every judgment there hath been a course and work of Justice against the will of the defendant, as is presumed; and this in a court of justice; and the records of such judgments are entered in publick rolls, not kept on, carried

Col. li. 5. f. 28
So *Wray* and
Gandy inter
Bond and
Bales. 28 Bl.
vel *citer*

Yea though
a writ of *error*
by the
executor to
reverse the
judgment,
yet suffering
a statute to
be executed
must pay of
his owne
Read and
Brabiche
case, p. 43
Eliz. Ba. re.
So held in
Reads case
sup. a.
vide 12 H 7
Ketw. 24, 25
to like pur-
pose.

Co. lib. 4. f.
39. So *Pe-*
ysam in com.
ba. inter
Charnock &
Worsh. 34
Eliz. vel *cir-*
citer.

in pockets or boxes as statutes, as untill
inrollment recognizances are. There-
fore executors must take heed that judg-
ments against their testators (before debts
any other way) if they have not suffici-
ent for both, be first satisfied; lest they
draw the burden of this debt upon their
own backs. Now their way to help them-
selves, being sued or pursued for other
debts, is the same before delivered touch-
ing debts upon record to the Crown, viz.
by plea, where they may plead; as in *Scire*
facias, upon a recognizance or suit upon
band, and by *Audita querela*, where they
cannot plead, as when execution is sued
upon a Statute. And if they had no war-
ning in the *Scire facias*, but upon *nihil* re-
turned the judgment passed, there also the
executor may be relieved by *audita quere-*
la, because there was no default in him
that he did not plead or set forth the
judgment upon the suite in the *Scire fac.*
Nor will it be any plea for the Creditor
by statute to say, that his statute was ac-
knowledged before the judgment, and
so is more ancient, for a latter or more
puiſne judgment is to be preferred be-
fore a statute in time precedent. But if
this judgement be satisfied, and it one-
ly

ly kept on foote to wrong other creditors, or if there be any defeasance of the judgment yet in force, then the judgment will not avail to keep off other creditors from their debts: And thus much touching debts by judgment, *viz.* how they stand in priority before other debts by statute or recognizance. Now to see how they stand among themselves, let this be observed, *viz.* that between one judgment & another had against the testator, precedencie or priority of time is not material, but he which first sueth execution must be preferred, and before any execution sued, it is at the election of the Executor to pay whom he will first; yea, if each bring a *Scire fac.* upon his judgment, the executor may yet confesse the action of which he will first, notwithstanding the *Scire facias* was brought by the one before the other. In this *Sci. fac.* the defendant may plead generally that he hath fully administred before the *Sci. Fac.* brought, without shewing that hee did administer in payment of debts of as high nature; yet that must be proved upon the evidence, else the trial wil fall out against the executor. Thus have I delivered the most material things in my apprehension

Co. l. 5 f. 28

Co. lib. 8 E

132.

So held in

15 & 16 El.

So in the

Scire facias,

by Bond a-

gainst Bales

it was held.

hension touching debts by judgment, yet thereof I will adde for the better information of the Reader, not studied in the Law, these few things. First, that what hath been said is only to be understood of judgments against the testator, and not of any against the Executor himself, for of those, being but debts by specialty at the time of the Testators death, we shall speak after. Secondly, what is said of the testator in case of an Executor immediate, is likewise to be understood of the testators testator in case of the executor of an executor: for where *A* makes *B* executor, & *B* makes *C* executor, there the goods which came from, or were left by *A*, be not in the hands of *C* liable to judgments had against *B*. Nor on the other side, are the goods of *B* in the hands of *C* subject to the judgments had against *A*. And the like is to be understood of statutes, recognizances and bonds, as elsewhere is somewhat touched. Thirdly, Recoveries or judgments by meer confession without defence, are yet of the same nature, and to have the same respect as other recoveries upon trial or otherwise; for although they may seem to be but of the nature of recognizances, which be *debita recog-*

9 El. 4. 14, 15
 Quare of
 arrerages of
 account be-
 fore auditors
 without
 suit: for the
 executors
 are charged
 by judgment
 of the Au-
 ditors, by
 sta. 27. 3 judg-
 of record
 20 H. 6. 24
 25 Bre. det.
 183

recognita, yet do they differ from them, in that here a debt is demanded by a declaration which is intended true, and that therefore the defendant cannot deny it; but in case of a recognizance it is not so; for there usually no action is entred, nor debt demanded. Fourthly, the foreshewed respect to debts by judgment, is not to be intosed within Westminster Hall, and be restrained to the four Courts there, but may and must extend it self to judgments in other Courts of Record, viz. in Cities and Towns Corporate, having power by Charter or prescription to hold pleas of debt above forty shillings, as in London, Oxford, &c. For although there execution cannot be had of any other goods than such as be within the jurisdiction of that Court, yet if the Record be removed into the Chancery by *Certiorari*, and thence by *Mittimus* into one of the Benches, so execution may be had upon any goods in any County of England. Fifthly, in case where the testator was bound in a recognizance and a *Scire facias* brought against him, and thereupon judgement given; although this judgement be not *quod recuperet*; as in case of actions of debt, but *quod habeat executionem*.

Quare of judgement in a writ of Assumpsit for arrears after.

nam, yet since execution is the life, fruit, & effect of all judgments, this may now well stand for a debt by judgment, as I take it.

Of Recognizances and Statutes.

NEXT unto debts by judgment, are those by statute or recognizance to be regarded by the Executor. And because I find no difference of priority or precedency between these two, I therefore rank them together; yet one reason of preferment given to judgments before statutes in *Harisons case*, viz. that the one remains a Record upon a roll in the Kings Court, whereas the other being carried in the pocket of the connisee is more private; this, I say, should give priority also to recognizances before statutes. As also another reason, for that statutes are not properly records, but obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the statute is the more expedite remedy, since thereupon execution may be taken out without any *Scire fac.* or other suit, which cannot be in the case of a recognizance, for there if a year be past after the acknowledgment, no execution can be sued out against the party

party himself acknowledging it, without a *Sci. fac.* first sued out against him: And if he be dead, then though the year be not past, yet must a *Scire facias* be sued, and thereupon the executor defendant may plead some plea to hold off the execution for a time. But this notwithstanding, the executor may satisfy the recognizance before the statute, at least if he do it before execution sued thereupon; for they standing in equal degree, it is at his election to give precedence and preferment to whether he will. Neither is it material which of them were first or more ancient; nor between one statute and another doth the time or antiquity give any advantage as touching the goods, though as touching the Lands of the consor it doth; but as for his goods in the hands of his Executor, whosoever first getteth hold of them by his execution, shall have the preferment. And before suing of execution, the executor may give precedence or preferment to whom he wil. But now some may object, that there is no course nor writ of execution for any such consor against the executor, & if so, then statutes merchant, and of the staple, are in vain spoken of, and it is true that Master

Before *Sci. fac.* not after voluntarily, but if levied by writ of Extent. *fa. good.*

Brooke

Bso. No.c.
294 & Stat.
Mar. 43.

Cal. 5. 13
b H 40
El. rot. 119

P 32. El. rot.
235. in co. b.

Brooke, after Chief Justice of the Common Pleas, in his new cases professeth, that he knew not any remedy for the creditor out of the goods of the cosuer after his death. But if this should be so, the Law were very defective, since the substance of many, especially of merchants, for and among whom the statute merchant was provided, consisteth usually more in goods then lands; besides the plea of *Harrison*, administrator of the goods of *Sidney*, in bar of *Greenes* action of debt upon an obligation, viz. that the intestate stood bound in a statute staple to *J. S.* and *Greenes* reply therunto, that there were indentures of defeasance, no covenant whereof was broken; and the resolution of the Judges that the said matter in the replication was good to avoid the defendants plea; All this, I say, (and the resolution of the Judges of the Common Pleas in that case, and in the case between *Pemberton* and *Barram*, as also in the Kings Bench by *Popham* and the rest of the Judges, that Executors must satisfy judgements before statutes, and statutes before obligations) had beene idle, and favouring of grosse ignorance, if no execution at all

all could be had against the Executors of See Colib. 5
 him bound in a statute; and then should 91 executi.
Greene have demurred upon the plea of on against
Harrison, and needed not to have pleaded an Exec. up
 that other matter, but none of the Judge on a statute.
 es or Serjeants ever conceived any such Remains
 matter: that which there was replied case.
viz. that the statute was not forfeited, Colib. 5. f.
 is here to be remembered, as good mat- 38 So if sa-
 ter both against statutes and recogni- rified,
 zances, and that whether the recogni- though not
 zance have a defeasance or a condition discharged.
 not broken, so that the recognizance is
 not forfeited. In none of these cases is
 the Executor hindered from payment of
 debts by specialty, nor can he be justifi-
 ed or excused if by colour thereof he re-
 fuse so to doe; and indeed else might
 creditors be exceedingly defrauded by
 recognizances for the peace and of good
 behaviour, &c. and so by statutes for
 performing covenants touching the en-
 joying of Lands, if these should keepe
 off the payment of debts, and yet them-
 selves perhaps never be forfeited, nor the
 summes become payable.

Of debts by specialty.

NOW come we to debts due by specialty, *viz.* Bond or Bill (of which nature the greatest number of debts are:) let us then see what course the Executor must or may hold for satisfaction of these, admitting that the Testator stood not indebted by any record, or that no forfeiture is of any such debt, or that there be goods in the Executors hands above the amount of such debts by record. This I say, *dato*, then according to the rule, *Proximus quisque sibi*, the Executor may first satisfie himselfe of such debts, as the Testator by specialty owed him: for such debts are not released by the creditors taking upon him to be Executor to the debtor, though on the other side if the creditor make his debtor Executor, this is a release of the debt. Although it be given out or commonly spoken in the general, that an Executor may first pay himself, yet is it to be understood with this caution or condition, *viz.* That the debt to him be of equal height or dignity with the debts to others, according to the rule, *In aquali jure melior est conditio possidentis*,

possidentis, for if his testator were indebted to other men by any statute, judgment, or recognizance, & to him whom he maketh Executor only by bond, or other speciality, then may he not first pay himself, that is, by paying of himself leave them unpaid whose debts are of an higher nature, but if there be sufficient for satisfaction, both to them and himself, then is it not material which be first paid. Now touching the debts to other men, the Executor hath power to give preferment, in payment to whom he will; so that if the Testator left but 100. *li.* being indebted to *A* 100. *li.* and to *B* 100. *li.* by several obligations, the Executor hath power to pay *B* his whole debt, and to leave *A* altogether unpaid any part of his debt, so as he have not commenced any suit before payment to *B*. But yet herein this difference is to be taken and observed by Executors, that if the time of payment upon the bond of *B* were not come at the time of the Testators death, then may not the Executors before the mony to *B* become payable, pay him & leave *A* unpaid, whose money was presently due. Yet if *A* forbear to demand or sue for his debt till the debt of *B* become also payable, then

18 H. 8. Dy.
32. Doct. &
St. Ca. 10. p.
78.

is

Do. & St.

p. 78

Quere If
then he may
not plead
this judge-
ment *post ali-*
contin. a-
gainst *A. 23*
he may
plead it a-
gainst other
suits after
commenced.
Co. li. int.
148. 149
142. 2.

is it at the will of the Executor to pay whether of them he will; so as the other may lose his whole debt, if the goods will not suffice to pay both. What if *A* have onely by word demanded his debt, and not by suit, before the debt to *B* become payable, whether doth that hinder that the Executor may not now when the money to *B* is also payable, pay him and leave *A* unpaid? And hereunto S. *Germs.* answereth negatively, making this verbal demand to be idle and of no value: yea, he addeth, that if *A* have commenced suit before the debt to *B* become payable, yet if the Executor can delay the suit till the debt of *B* become payable, so that *A* can get no judgement before that time, and before *B* hath commenced suit upon his hand, then may the executor confesse his action, and so pay his debt, leaving *A* unpaid. But of this I make some doubt, for that I find in 9. of King *Edw. 4.* some admittance, that if *A* having a Tally, Patent, or other Warrant from the King for receipt of money, of or from a custom or receiver where other had like warrants before him, but *A* maketh the first demand, now must the officer first pay him,

him, or else himselfe shall become debtor to him, if he first pay others, whose demands were after made, though they had warrants before. Likewise there is, as to me it seemes, some admittance in the same booke, that the very demand made by a creditor of his debt from an executor, who hath then assets in his hands, doth intitle the creditor to recover damages against the Executor out of his owne goods, which if it so be, then doth even the verbal demand lay some tie or obligation upon the Executor for payment. But hereabout I lay downe nothing peremptorily. We partly may discern by the premises how the Executor is to guide himselfe, in case where there be divers debts by specialty all due, and payable at the Testators death: before any suit commenced for any of them; for in that case clearly the first verbal demand gives not any precedence, all being due, and so standing in equal degree; And this is implied in many books, making the commencement of the suit only that which intitles to priority of payment, or at least restraines the election of the Executor. Yet admit that one creditor first doth begin suit, if others

41 E 3 Fiv
Ex. 68. 6 2
El. Dy. 333
vide 51. H4
Kelw. 74.

5 Hen. 7. 27
So Walm-
ley inst. p.
39 Eliz. in
Error. al.
Serjeants
Inne.
Co. li. Intr.
269. such a
recovery by
confession is
pleaded a-
gainst ano-
ther, & ad-
mitted good
& fo. 148, 149.
Do. & St. p.
78. b.

others also after sue before he be paid
or have judgement; now cannot the Exe-
cutor pay him first, who first commenced
suit, but he who first hath judgement
must first be satisfied. And the Execu-
tor may herein yeild helpe to one before
the other, viz. by essoignes, emparlan-
ces or dilatory pleas to the one, and by
quick confession of the others action;
for he is not bound against his will to
stand out in suit, and expend costs where
the debt is cleare, nor is this covin but
lawful discretion, which conscience will
also approve, some good consideration
inducing. Nay after suit commenced,
yet until the Executor have notice there-
of, he may pay any other creditor, and
then plead that he hath fully administered
before notice. Nor is the Sheriffes re-
turne of summons or distress sufficient
cause of notice, for the summons might
perhaps be upon his Land. but if it were
to his person, it is notice sufficient; and
then to save himselfe, he must say that
he was not summoned till such a day, be-
fore which he had fully administered; yet
doubtlesse the Executor may be arrested
at the creditors suit in some sort, which
yet shall be no sufficient notice of this
debt.

debt. As for the purpose, if he be sued by *Latitat* out of the Kings bench, this supposing a trespassse, gives no notice of a debt, so also of a *Subpoena* out of the Exchequer; but the original returnable in the Common-pleas expresseth the debt, and so in some sort do the processe thereupon. And there it seems by some books, So also was it said Trin. Eliz. that if it be laid in the same County, where the executor dwels, he must take notice of it at his own peril. But this I take not to be Law, nor is there any great opinion that way: and although to make it more cleer, the Executor in King *Hen.* the fourth his time; estranging himselfe from notice of the suit before payment to others, did alledge that the action was laid in a forraign County; that is no great proof that if his abode had beene in the County, where the Action was brought, he must have taken notice; but thus it was cleerer, and a little surplussage hurts not.

Now betweene a debt by obligation, & a debt for rent or damages upon a Covenant broken, I conceive no difference nor any priority or precedency, but it is at the executors discretion to pay first which he wil, as if all were by bond. So also

P

of

of rents behind and unpaid, as I conceive; but touching them, principally intending rents upon leases for years, divers considerations are to be had, and some distinctions to be made: as first, between rent behind at the time of the testators death, of which that before said is to be understood, and that which groweth behind after, next between suit for the rent by action of debt, and by distress and avowry. As to the first difference, if the rent grew due since the testators death, then is it not accounted in Law the testators debt, for only so much is in Law accounted assets to the executor as the profits of the lease amounted to over and above the rent, so as for that rent so behind the executor himself stands debtor, as hath been resolved, and therefore he is suable in the *Debt* and *Detinet*; whereas for rent behind in the Testators life, and all other the debts of the Testator, he must be sued in the *Detinet* onely. Hence it must follow, as it seems, that an executor sued for debt upon bond or bill, cannot (except in some special cases) plead a payment or recovery of rent grown due since his testators death; though of rent behind at the time of his death it be otherwise. And yet
here

here again another difference or distinction is to be taken, *viz.* where the profits of the lease exceed the rent, and where the rent is greater than the yearly value of the profits; for even there, as elsewhere is shewed, the executor, if he have assets, is tied to the holding of the lease, and payment of the rent, and consequently doth so much of that rent as exceeds the yearly profit, stand in equal degree the testators debt, with other debts by specialty; and yet again to re-consider this point, what if the debts of the testator by specialty payable presently at his death, or before the time that any rent can grow due upon this Lease, shall amount to the full value of the testators goods; may not then the executor, though he do not pay those debts before the rent day (for that would make the case clear) waive the terme; for if he may, then haply if he do not so, but shall by payment of any of this rent want goods to pay any part of the debts by specialty, it may lie upon himself, and his own goods, as hapning by his own default. But on the one side, it may be said that he could not waive it so long as he had assets, because thereby he stood equally liable to pay that debt, be-

ing once due, as the other debts by specialty. On the other side it may be said, that though the debts for rent, and upon bond, shall be admitted to be in nature equal; yet the case being put of rent not due at the time of the testators death, it was not then a debt nor duty, whereas a bond makes a present debt and duty, though not presently payable, the day of payment being not yet come, so as this latter is discharged by a release of debts, or duties, and so is not the former. So to leave that point unresolved, let us next see whether in some case, though the rent exceed not the yearly value of the Land, yet even that payable after the death of the Testator may not stand in most part, if not wholly upon the Testators score as his debt, as well as if it had been payable before his death. *Posito* then, that the whole or half years rent is payable at the Annunciation of our *Lady*, and that the testator dieth two or three daies, or some like short time before that feast, now certainly should the Law be unreasonable if it should lay this debt upon the executors shoulders in respect of those few winter-dayes profits which he took. But surely since the taking of the profits induceth
the

the Law to lay the rent upon the Executor as his own debt ; therefore as where the executor had the profits for the whole year or half year, except some few daies incurred in the testators life time , those few daies will be unregarded according to the rule, *De minimis non curat lex*, and the whole rent shall lie upon the executor as his own debt. So on the contrary part, where the whole year or half years profit except some few dayes incurred after the Testators death, the rent becoming payable so instantly after the testators death, must in reason lie wholly upon the testators estate , as to me it seemes. What if to this I adde that the testators cattel wherwith the ground was stocked, doe depasture and devour the profits all the time after the testators death, till the day of payment of the rents ? Nay, if the rent were payable at *Mich.* and the Annunc. and the Testator dies a few daies after *Mich.* the rent being of, or neer the value of the land, it wil then be hard that the executor shall for this Winter profit pay the rent out of his own purse, especially if the whole years rent be payable at that one day, as in some cases it is ; or if the whole years profits were taken in

the Summer, as in case of a lease of tithes, it is so also of meadow grounds usually drowned in the Winter. So if the lease be then to end, not having a Summer halfe year to succeed, and make amends for the Winter: or if the Winter halfe year be the latter halfe, the lease beginning at *Lady day*, so that there is but a Summer for each Winter following, and not any for the Winter passed. Of like consideration with these, is the case of a lease of woods for a rent, which being sellable but once in eight or nine years; now if the Lessee having made the last sale and selling before his death, the Law should cast the rent upon the executors own estate for the time future, it should lay losse upon him, which is against reason, and contrary to the nature and disposition in the Law, even in this particular. As appears by this, that shee enables an executor to pay himself before any debt of equal nature. so as shee more tenders an executors indempnity, than any other creditors; therefore I think that with, & upon the differences above shewed, even rent growndue after the testators death, may in some cases be the testators debt paiable equally with debts by bond.

But

But here I conceive that if the Executor were in such case of destitution of assets, as might justify his waiving of a lease over-rented, hee then may waive the terms residue, because for the future the profits will come short of answering the rent, though at the first, and so in the total, the profits did exceed the rent. And if for want of waiving where hee might, this rent fall upon him, the payment thereof would be no excuse against another Creditor, nor as to him be a good administration, for *Ignorantia juris non excusat*. This is pertinent to our present consideration, which debt may with safety be paid, leaving another unpaid; and the hazard of executors by ignorance of the Law hath been a principal motive to my writing these discourses in English. Hitherto we have only considered, as I think, of rents, as they be recoverable by action of debt. Now let us see if there may not be somewhat different considerations touching distraining for rent, and so coming to recover it by avowry. Put we then the case that an executor hath fully administered in payment of debts by bond, and after the lessor or reversioner cometh and distraineth for arrearages of

rent due in the Testators life; can the executor in barre of the avowry plead fully administred, as he might have done, if an action of debt had been brought for these arrerages? doubtlesse I think no, nothing shall hinder the levying of the rent upon the land, so long as it is enjoyed under the title of the lease, except the Land come to the King, upon whose possession no distresse can be taken: I thinke therefore that the executor, who paid out of his own purse to the value of this lease (for so I intend the case, and else could he not have fully administred, as in the case was put) he should, I say, have abated in the price and valuation of the Lease, as well the arrerages of rent, as the rent futuramente payable, both being equally leviabie upon the land; and if he so have done, he is no loser by paiment of this arrearage: but if trusting to the power of an Executor, and to the plea of fully administred, he did not so; but disbursed in respect of the lease to the full value, without such abatement, he must bear the losse of his own ignorance. He might also another way have helped himself; viz. by payment of that arrerage, leaving other debts by specialty unpaid. And what if suits were presently

presently commenced upon the testators death, before he could make payment of the rent behind, whether might the executor then plead this debt for rent, as he might a debt by judgment or statute? and surely me thinks it probable that he might, because it is a debt from which he cannot be freed by payment of the other debts sued for by specialty. If the reversioner would also commence suit before judgment had for the creditor by specialty, then might the Executor helpe himselfe by confessing his action first; but this perhaps the reversioner would not conceive safe for him, since that way the others might get judgment before him, and so he might lose both his suite and his debt; whereas holding himself to the course of distress, the lease continuing, he hath land at the stake for his debt. What if he distrain and avow? may not now the executor pay him, or at least confesse his action or avowry, so as he first having judgment, may first be satisfied? Surely after suit commenced, I see not how the creditors by bond can so be prevented, at least without judgment had for the rent; yea, though such a judgment be had, yet because the judgment in that case is not that hee shall recover the

the summe due for rent, but onely that he shall have a returne to the pound of the cattel distrained for the rent, it is questionable whether the payment thereupon of the rent shall prevent the judgements after had in the suits upon bonds. But I think it shall, because although it be not an expresse recovery of the rent, yet it is such a judgement compulsory for the same, as makes the payment inevitable and of necessity. And where before we have made the question only betwene the said rent-debt, and the debt by obligation: let us now put the case between the rent-debt and the debt by statute or judgement. If then the Lessor after death of the Lessee distraine for the rent behind, part of the Testators cattel, and after there come a writ of execution upon a judgement or statute of the Testators; whether shall these beasts in the pound for rent be delivered in execution or not, admitting that without them there be not goods sufficient for satisfaction of the judgement or statute? And surely I think they cannot be delivered in execution: First, for that they are in the custody of the Law, as in *String-fellows* case, though there the Kings prerogative

Sec 13. R. 2
Bro. Pledges
31 Attainder of the
party di-
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stress. *V. Dy.*

rogative overtopped that point ; yea, so I thinke, though they be replevied, for that they are to be returned to the pound, if judgement passe for the avowant, to which purpose security is given, so as they are but in the case of a prisoner bailed, who still is in some sort in custodie. Secondly, for that this rent incident to, and descendable with the reversion, breeds a debt of a real nature, and so of more dignity and worth then debts personal. Thirdly, for that the Land let (as in a sort debtor) stands chargeable with this distress from the very time of making the Lease, as either by a contract real of *quid pro quo*, or rather by an operation of Law or Legal constitution, or ancient custome of the Realme, without any contract of persons. Lastly, for that the Lessor doth not distraine the cattel therefore, or in that respect, for that they are or were the goods of the Testator, but for that he found them levant and couchant upon the Land which must afford his rent, or a distresse for it if behind ; so as if they had beene any under tenants or stranges Cattel, they might have beene distrained. Some may perhaps object
this

this reason why these impounded cattel should be delivered in execution, *viz.* for that where otherwise the creditor by statute or judgement should lose all or part of his debt, yet by this relief done to him shall not the Lessor lose his rent, for that he may at any time after distraine any goods or cattel found upon the ground at any time during the continuance of the Lease. But here, besides the point of delay and stay for this rent, which to many is the sole meanes of maintaining their households and families; this further is considerable, that perhaps the lease may be neare expiring, perhaps so highly racked and rented, even to or above the value, as that the Executor having his Testators stock taken from it and him by execution, will not stock it any more, and so the land lying fresh, if the Lessor shall lose the benefit of his former distress, he shall be perhaps without remedy for his arrearages of rent. And if the case were of a distress for rent behind after the Testators death, I conceive though not so strongly, for most of the reasons above-said, that the Law would be all one as in the other case; for though in this case respect shall not be had to the Executors losse

losse upon whose goods the Law casts this debt, though not the other, yet here the point of losse must fall either upon the Lessor losing his distresse, or upon the other creditor by specialty or record losing wholly or in part his debt. And in respect of this local tye upon this Land for payment of the rent, whereto even the fealty of the Lessee and tenure of the land bindeth him, I thinke no act that the Lessee can doe by entring into bonds or statutes, or having judgement against him can hinder the lessor or reversioner from taking his remedy upon this leased land for the rent therfore due, but rather any other creditor shall be a loser in his debt. Doubtlesse if in barre to the avowry for this rent due either before or since the Testators death, the Executor will plead that the Testator was indebted 1000. *li.* by statute, recognizance, or judgement, which is more then all his goods amounded unto, it will be no good plea, but may be demurred upon. What if he pleade so much debt of record to the Crowne? surely I doubt whether this plea will be allowed in any other Court then in the Exchequer; yet if these arrerages of rent shall be levied upon the

Vid. Bro.
Pledg. 31.

the Land, so as either the Executor must pay it, or lose the cattel distrained by a returne irreplevisable, and then shall not have sufficient to satisfy the debt to the Crowne. I see not how he shall well escape, when pursued in the Exchequer to make up this Crowne debt out of his owne purse, which is hard. For this we may pitch upon as a *Maxime* and principle, that an Executor, where no default is in him, shall not be bound to pay more for his Testator then his goods amount unto. Againe, it is a rule, that where nothing is to be had, *viz.* justly to be had, the King loseth his right: and our books tell us, the Kings Prerogative must not doe wrong, *Potestas ejus juris est, non injuria: nam potestas injuria non est Dei, sed diaboli.* On the other side it may be said, that if Land Leased come to the King by grant, outlawry, or otherwise, the rent reserved cannot be distrained for, and therefore it is not very unreasonable nor incongruent that the Kings interest for his debt should make the distress of a subject stand by and give place. This therefore among other of the premises doe I leave as a *quare*: nor is it altogether unprofitable

So Braddon.

fitable either for an Executor or creditor to know what wayes and passages, what cases and contingents be doubtful and hazardous. And if in these unbeaten pathes where our bookes and relations have held me forth no light, expresse, or particular, I have erred in mis-resolving, or missing to resolve, I hope I shall without difficulty obtain pardon.

Not resolving.

Now let us consider of assumptions or promises made by the Testator upon good consideration; the performance whereof or making recompence and satisfaction for not performing, doth lye upon an Executor as before is shewed. These therefore are to come behind and give place unto all the former, so as an Executor this way or for these sued, may plead debts by specialty, rent, &c. amounting to the whole goods. And yet these debts by contract or assumption express are to be satisfied before Legacies be to be had. First, because by the common Law of the Land those are recoverable, and so are not Legacies: next because, as our bookes speake, it concernes the soul of the Testator to have *as alienum*, all duties and debts to other men satisfied before the debtors voluntary gifts or bequests

Co.lib.9. fo. 88. b. Doct. & Stu.lib. 2 cap. 10 & 11.

quests. Also these debts by assumption or simple contract, are to be satisfied before the reasonable part of the wife or children, to which by custome in some Counties they are intituled, see 21. Ed. 4. 21. & 2. Ed. 4. 13. & 2. Hen. 6. 16. And note that in such an action upon the case it is not of necessity to lay or set forth in the declaration that the defendant hath Assets to pay all debts by specialty, and this also; but if there want, the defendant must alledge that in his excuse, for else it shall be presumed that he hath assets. So also in an action upon a case grounded upon the Executors own assumption to pay his Testators debt: and yet as the Ld. Cooke conceives, and upon good reason as to me it seemes, if the Executors so promising had not assets sufficient in his hands to pay this debt promised, he pleading *non assumpsit*, may give that in evidence, for then the consideration faileth, as also if there were no such debt due, since the plaintiff could not have recovered if he had sued, and so his forbearance to sue was no valuable consideration.

Co. l. 9. fo.
90. b. Pin-
sons case
and fo. 94.
Bents case.

CHAP. XIII.

Of Devastation or Wasting.

THat which St. *Paul* of dispensers spiritual, who are as it were the executors of the last will and testament of our Saviour Christ, doth say or enjoyne; *viz.* that they must be found faithfull: The same is required of these lesse or inferiour dispensers, the executors of mens Wils: and hereof they are to be regardful, not only in respect of escaping damage to their own estates, but more especially in respect of an oath which divers of our books mention to be taken by executors. And in one of the books of relations of cases in the twentieth year of *H. 7.* his time, there is an expression of three things whereto the Office of an executor tieth him. 1. To do truly, and thereto are they sworne, saith this book. 2. To be diligent, *viz.* with sedulity to attend the discharge of the trust. 3. To doe lawfully; nor well can this latter be without knowledg what is lawfull

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or

or required by the law. Now what is formerly said of the right method and order of payment of debts, discovereth in much part how, and by what wayes an executor may waste and mispend his testators goods, and consequently incur a devastation, and so make his own goods liable. But of that more fully and particularly by it self, and herein we will consider of these parts.

1. What shall be said to be a wasting or devasting, and how many waies that may be done.

2. Who shall by this act be charged to yeeld recompence.

3. Who shall take the benefit or advantage of it.

4. How farre or in what measure the advantage shall be taken.

5. What way, or by what means it shall be had.

As to the first, this wasting is done divers wayes. 1. By the Executor his plain, palpable, and direct giving, selling, spending, or consuming the Testators goods after his own will, leaving debts unpaid. 2. By paying what is not to be paid, which yet is to be understood where there are debts payable and unpaid.

paid. 3. By the way formerly discour-
 sed of, *viz.* the not observing the right
 method and order of payment. 4. By as-
 senting to a legatee having a thing be-
 queathed, debts being unpaid. 5. By sel-
 ling goods of the Testators at an under-
 value, for (be the appraisement what it
 will, and let him sel for what he wil) he
 must stand charged to the best and utmost
 value towards the creditors. Yet if upon a
 judgment against the testator or the exe-
 cutor, the Sheriff sel some of the testators
 goods at an under value, this is no va-
 luation of the executor, for this difference
Hody chief Baron makes. But since an ex-
 ecutor may haply prevent this act of the
 Sheriff by paying the due sum upon sale
 of the testators goods at the best value or
 otherwise, he is to be blamed to leave it
 to the conscience of the Sheriffe or Un-
 der-sheriffe rather. 6. And lastly, this
 may be done to the executors smart by
 undue, *viz.* not legal discharging of any
 debt or duty pertaining to the testator,
 and that divers wayes requiring heedful-
 nesse. As if an executor upon a bond of
 two hundred pounds forfeited for pay-
 ment of 100 l. accept the principall, or
 perhaps also some use, costs, or damage,

Q 2

and

13 E 3. Fitz
91

Yet on the
other side, if
an executor
by payment
of a 110
pounds, get
in a forfeit-
ed bond of
200 l. it shall
be an admi-
nistrat. but of
110 pounds,
27 H. 8. 6. p.
Fitz. inst.

and give a release or acquittal of the whole forfeited bond, or of all actions, or upon Record acknowledg satisfaction upon judgment had. This is a waisting of so much as the penal sum is more then is received, and so far his own goods stand liable to creditors not satisfied; and so doubtlesse is it if he do but give up the bond having no judgment upon it, though hee neither make release nor acknowledged satisfaction. But his verball agreement to require or sue for no more, or his giving a note of receipt for so much as he hath received, or delivering of the bond into a friends hands, or into a Court of equity in way of security to the debtor that he shall not be sued for more, is no devastation, since stil the rest in law remaines due and suable. So this sets no more upon the executors score then he received. But let him take heed of releasing, except he be sure there be no other debts demandable. Nor only is there danger in releasing of debts, but of trespasses or other causes of action also. As if one take away goods from the Testator, or from his executor; If the executor make him a release, this is a devastation, and makes his own goods liable to the

the whole value of the goods released, as appears by *Russels* case, where the release of an infant executor to one who had taken and committed to his use Jewels and goods of the testator, being pleaded, the release was therefore held void in respect of nonage, for that if it should have stood good, it had amounted to a *Devastavit*, and made the executors own goods liable; which, his infancy considered, had been hard. Another way of discharging, dangerous to Executors, is submitting matters of debt or duty, or touching goods taken away, to arbitrement. For if by the award of the arbitrators the debtors or wrong doers be discharged or acquitted without making full recompence, the rest of the value will (as to other creditors) sit upon the executors skirts, because it was their voluntary act thus to submit it to arbitrators. Thus may executors fall under prejudice, not only by wilful wasting or unfaithful miscarriage, (wherein they are not to be pitied) but through incogitancy and unskillfulness also. Nay, I may say truly, that it is very hard for executors in some cases to walk safely: for besides that to find out all judgments & recognizances by or against their

their Testators, is of some difficulty more then for statutes, whereof by search in an Office desery may be had; yet with this difference, that statutes Merchant, and statutes staple may be and stand effectual against executors, though not inrolled, albeit against purchasers of the conveyors land they be not of force, if neglect be of inrollment within three months. But where statutes or recognizances lie for performance of covenants upon sale or lease of lands, marriage, agreements, or otherwise; how hard is it for Executors to know whether any covenant be broken or not; how hard to be sure they find out all bonds, bills, covenants, and articles in writing made and kept by others, whereby any money is due and payable before debts by contract or legacies, as also all promises or debts by contract payable before legacies? For the law hath prescribed no time for their claime and demand, and whether some such thing or mean of publication were not fit to be enacted, let the judicious consider. To attaine to this knowledg of the testators debts, I remember that it is by the Lord *Brook* reported, that in King *Hen.* the 8. his time, Sir *Edmund Knightly* being executor

entor to Sir *William Spencer*, made Proclamation in certain Market Towns, that the creditors should come by a certain day, and claim and prove their debts; but he for this was committed to the Fleet and fined. For that none may make proclamation saith the Book, without warrant or authority from the King, except Majors and such like Governours of Towns, who by priviledg or custome may so do. But the dangers are only where there is not sufficient of the Testators goods and chattels to satisfie both debts and legacies. For where there is so, the executor is not in any such hazard as aforesaid. This descry of danger may breed caution, and *Quæritur* *ment cavent, & vitant.*

As to the second, we shall have in consideration two sorts of persons, *videlicet.* 2

1. His executors, there being many times divers executors, and the waste or devastation done but by one. Next the Executors own heirs, executors and administrators, *viz.* whether he dying, this act shall fix upon them like charge and burden for satisfaction, as upon himself should have lien in case he had lived.

Touching his companions, though all together

Lib. Intra.
fol. 327
Kelw. rep.
fol. 23
So 11 H 6.
38.a. 4 El.
Dy. 210 a
the Writ so
issued a-
gainst the
waster only
P 4. H 8. rot.
303.
Tr. 34 Eliz.
Pas. 36 Eliz.

together make but one Executor, yet the mis-doing of one shal not charge the rest, nor make their goods liable to recompence: as both appears by the Book of entries, and was also held in the time of Henry the seventh, Anno 12 of his Reign. Yea of the same opinion were the Judges twice in the late Queens time, viz. first in a case betweene *Walter* and *Sutton*, in the common Pleas, and shortly after in the Kings Bench in a case betweene *Hankesford* and *Metsford*; though these two cases be not reported in Print. And surely this stands with rules of Reason or Justice, that each should bear his own burden: If it were otherwise, many would decline, and abandon executorships as very dangerous to the most honest and faithful, in case they were subject to wracking by the miscarriage of their Colleagues.

As for the Executors or Administrators of the wasting executor dying before he have borne the burden of this mis-doing, I have found contrary opinions even in the late Queens time. For first, in the *Exchequer* it was conceived to be as a trespass dying with the person, as coming within the Rule, *Actio personalis moritur*

CUM

sum persona. But in the said case of *Walter and Sutton*, the court of Common pleas was of contrary opinion, viz. that this was not escaped by the death of this misdoer, but the law would pursue his executors or administrators, and lay upon their backs the burden of recompence or satisfaction; for that the testator or intestate doing this wrong had made himself to be debtor in the first testators stead, and therefore they who represent his person must with his goods make amends and supply; and this later opinion was something in time after the former. Also between these two times was there an opinion in the said Court of common pleas agreeing in part with this later: For there a judgment being had against an Executor, and the Sheriff upon the *Fieri fac.* returning that there were no goods of the Testator in the Executors hands, and then this executor dying, A *Scire facias* upon a suggestion of devastation by the said Executor deceased, was awarded against his Executor, and that upon good debate, and shew of a President left, and reported by M. *Tenour*, in King Hen. 8. his time. And it was then said to have beene cleare, that if a devastati-
on

Mich. 31
& 32 Eliz.
Tr. 34. Eliz.

Tr. 34. Eliz.

Mich. 32 &
33 Eliz.

one had been returned in the lifetime of the said wastful Executor, his Executor then should have been charged. All the doubt was, for that here that was not done in his life time; yet as last affirmatively (as above is shewed) the resolution was.

Touching the third point, *viz.* to whom the advantage of wasting shall accrue, or who by reason thereof shall charge this wasting Executor. Put we the case, the Testator stood indebted to *A* by Statute, and to *B*, *C* and *D*, by specialty, not of record, as Bond, Bill, &c. and the Executor having no more in Assets then only an hundred pound, and this all being due to *D*, he payeth him the whole hundred pound, not having any thing left to satisfie any of the rest of the Creditors: hereby wrong is done to none but *A*, who was a Creditor by Statute, and therefore he onely shall make this Executor to pay the like summe out of his owne goods, since as to him onely this is a devastation, for that it was at his election to pay off the other Creditors, which he would, no suite being commenced by any of them; consequently no wrong was done to *B*, nor *C*. And if no
such

such debt had beene by Statute, but all had been Creditors by specialty, and *A* onely had commenced suit, and that known to the Executor; now if after, he payed all to *D*, he stands only as to *A* liable in his owne goods, and not to *B* nor *C*. But if the Executor had onely paid a Legacy or debt by contract, leaving nothing for satisfaction of the debts by specialty, then had he stood equally lyable to each of the other Creditors. *Capiat qui capere potest*, viz. he who first could recover, or by the voluntary act of the Executor, could obtaine payment, must be preferred, if the summe would reach no further. For it shall by this mispayment, or misconversion stand with the Executor, as if he had not payed it nor departed from it at all upon the matter, and therefore I doubt not but it is free for him to give the advantage of this his error, to which creditor by specialty he wil, so as he shall stand free from all the rest, no surplusage remaining, nor any creditor of record being. For if there be any debt upon record, the Executor sued by a Creditor upon bond, may notwithstanding this his wasting, plead in Bar of this suit, that there is such a record of a debt not satisfied

If upon fully administered pleaded to one, *valitor*, he have the advantage of this vacation, taking up the whole sum wasted, *qua*. how the Executor shall relieve himselfe against another.

tisfied, and that he hath no more then that debt amounts unto, and so admit so much still in his hands as he hath mis-administred, though in kinde it be not in his hands, but mispent, or unduly payed, as aforesaid. And what is before shewed of the Statutes precedency before Bonds, in taking the advantage against an Executor for devasting or wasting; the same is to be understood of precedency of judgements before Statutes, and debts to the King before judgements, &c.

As touching the fourth point, viz. how far the Executor thus wasting shall incur damage or make his owne goods liable: Doubtlesse no further then the value of the Testators goods wasted or mis-administred. Therefore if one have advantage thereof to the full summe, no other after shall, for he is no further a trespasser or wrong doer, nor is the Testators estate any further, or deeperly damaged. And as damages for trespassse are to be proportioned to the value of the wrong done, and losse sustained: So also in this case the Executor by his mis-doing, doth not draw upon himselfe his Testators whole debts, but, so much only as the goods amounted to, which he did mis-

mis-administer, and which should have gone to the payment of the Testators debt, if he had not so misguided himself in the office of Executorship; which default he must reparaire or make good. And this proportion seemes to me proved, by the case in *K. Ed. 3.* where the value or quantity is found, especially of the goods administred wrongfully, though there by a wrongful person: and in *Suttons* case it was expresley held, that each Executor should answer for so much as he wasted. ^{41 E. 3. 31}

Now for the fifth and last point, viz. how, and in what manner relief shall be had upon this point of wasting, for him to whom it pertaines: First, this is to be observed, that in case where the verdict passeth directly against the plantiffe, no devastation can come in question, for that no judgment being for the plantiffe, no writ of execution can issue; and therefore if upon the issue of fully administred, it shall appeare that there hath been a devastation which causeth Assets to faile, then must the Jury finde that the defendant hath Assets, and not find a devastation, as was resolved in the Kings Bench in the late Queenes time between *Hankesford* and *Melford*, for there the Jury finding ^{Pal. 36. Bl. in 6. reg.}

ing a devolution, viz. a surrender of a lease for yeares, left by the testator, it was held void, and nugatory, and was not regarded by the Court, which said, that must come in by the Sheriffs returne, viz. upon the *Fieri facias*. Thus assets being found in the executors hands, judgment is given for the plaintiffe to recover his debt, and to have it levied of these assets; nor is this finding of them by a Jury against truth, though they be wasted, and so not to be had in kind: for the executor hath them in right, since he hath not rightfully parted from them; according to the rule, *Pro possessore habetur qui dolo (or injuriâ) desit possidere*. As in the case first put, this wasting cannot come in question for want of a judgment for the plaintiffe; so also where the judgment it self extendeth to the executors owne goods by reason of some false plea, whereof we shall after consider: for since that the consequence and effect of a valuation is but to make the executors own proper goods liable to the debt of the creditor, this is altogether needlesse where the judgment it self hath laid hold on his goods. But now in case where the judgment extends onely to the Testators goods

goods in the Executors hands, let us find the way to relieve the creditor, in case the testators goods be wasted by mis-administring or otherwise; for herabout the right way hath often been missed, and again easily may be. In the later end of the late Q. time this course was taken, viz. the Sheriff returning generally that the Executor had no goods, a surmise was entered, that the executor had converted to his own use the testators goods, whereupon a Writ was awarded to the Sheriffe to enquire thereof by jury or enquest, which he did, and returned that it was found that the executor had wasted the goods; and thereupon a *Scire facias* was awarded against the Executor, to shew cause why execution should not be of his own goods, and upon two *Nihilis* returned, execution was so awarded; but a writ of error was hereupon brought. And although it were said for defence of that course, that it was usual in the Common Pleas, and more favourable then the other course, where the Sheriff onely returneth the wasting, or is sole Judge thereof, whereas here it was found by an inquest of Jurors, and thereupon a *Scire facias* awarded; yet did the Court resolve

45 El. Pet.
tisers case.

Co. lib. 5 do.
32.

So 9. H. 6. f. 9

See Paston

11. H. 6. 16

36. upon

surmise that

A hath wa

sted, A *Fie-**ri facias* may

issue against

his goods

only. If so,

&c.

So lib. Int.

fol. 11.

resolve the contrary, and reverse this execution as erroneous: For it was said that upon the Sheriffes returne of *Nulla bona*, viz. that there were no goods of the Testator to be found, the plaintiffe should have a special Writ of *Fieri facias*, willing the Sheriffe to levie the sum recovered, either of the goods of the Testator; or if it could appeare that the Executor had wasted the Testators, then to levie it of his owne goods; and this way, as was said, the Executor hath good remedy by action against the Sheriffe, if without just cause he levie it of his goods; but the other way, viz. When inquest is thereupon taken, the remedy failes, since neither Sheriffe doing according to the inquest, can be punished, nor the Jurors finding falsely are subject to any attaint, it being no verdict upon issue joyned, but an inquest of office, which excludeth also all challenge of Jurors. And whereas that booke mentions the Sheriffs subjection to action onely in case of his misfeasance or doing wrong, I conceive that he is likewise suable for omission or nonfeasance in this case, viz. for not levying the debt upon the Executors owne goods where proof is made of

of his waſſing. And where the book mentions this *Fieri facias* to be in this manner upon the Sheriff's return in a *Sci-re facias*, doubtleſſe the book therein is miſ-printed, and ſhould be a *Fieri facias*, for in a *Sci.fac.* the Sheriff can return nothing but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the courſe there preſcribed, that firſt a general *Fieri fac.* goe out, and that thereupon the Sheriff return generally that the defendant hath no goods of the Teſtators, and that thereupon the ſaid ſpecial writ is to iſſue; yet in the beginning of the late Queens time, the verdict paſſing for the plaintiff upon the iſſue of fully adminiſtered, the Sheriff was not permitted to make ſuch a general returne of no goods to be found of the teſtators, but was inforced by the Court upon good adviſement, either to levie the debt, or to returne a *Devastavit*; and ſo was done at laſt by the Sheriffs of London much againſt their minds; and thereupon went out a writ to levie the debt of the executors own goods, firſt in London, and after into *Devonſhire*, upon a *Teſtatum* that the Executor had goods there: and it was there ſaid that

2 EL D. 185
Woodw. and
Chicheſters
caſe.

R

if

if no goods could be there found, then the Plaintiff might have a *Capias* to take the Executors body in Execution, or an *Elegit* for the moiety of his lands. But certainly I cannot finde (except with a difference) how this course of

11 H. 6. f. 28.
28 H. 8. Dy.
3 Yea Co.
lib. 6. f. 47.
46 Assets in
Ireland, or
elsewhere
beyond the
sea may be
found by
the Jury
where the
action is
laid.

For the pl.
may if he
wil suggest,
the being of
assets in a
forraigne
Country, and
this is usu-
ally done.
See lib. In. r.
11 a. A & i
on upon the
case for a
false return
of Devastat.
contra facr.
fui d. bitum
28 H. 8.

forcing the Sheriff to do one of these two can be just; as neither could Justice Fulthorp, in the time of K. Hen. the sixth, approve it. For a Jury of one County may find assets in another County, as was resolved in the time of K. Hen. the eight, which yet was understood of goods moveable, and not of lands. This then thus being, if a Jury of Kent find assets which be in London or Essex, how can the Sheriff of Kent, where the action was laid, leave the debt recovered by or out of these goods; or since hee cannot, why should he be compelled to make a false returne of a wasting, when the goods remaine unspent and unwasted in another Country? Why rather should he not be suffered to return according to truth, that there is nothing within his County or Bayliwick whereof the debt may be levied, since even his oath tith him to make a true return? Not is this contrary to the verdict, finding assets generally; and

and this so returned upon a *Testatum*, the proceſſe may be directed into the right County. But in the ſaid caſe it was replied to the plea of fully adminiſtered, that there were aſſets in *Esſex*, the action being laid in *Middleſex*, and yet as it ſeemes by the book, the trial was to be by a Jury of *Middleſex*, which, ſaith the book, may find the aſſets in *Esſex*; but there the plea was demurred upon, and held a good plea, which proves that although the tranſitorineſs of the aſſets make them ſubject to the notice of a forraign Jury, yet is it not like an act tranſitory, and not local, for that muſt be pleaded to be done in the place where the action is laid, though in truth not ſo. But had iſſue been joyned upon the point, me thinks it ſhould be tried in *Esſex*, where the aſſets be laid; the rather, for that perhaps they may be real chattels, viz. lands leaſed to the Teſtator, or other lands of him appointed to be ſold for payment of debts, which as heretofore hath been held a Jury of another County cannot find. Beſides, Although ſuch a forreign Jury may find other movable aſſets, yet is it at their election, they are not thereto compellable, as elſewhere is holden. Here then

3 Ma. Bro.
Attaint 104
and 10 El.
Dyer 371
Because lo-
call & fixed,
otherwise
held, 3 Jac.
in com. b.
Co. lib. 6 f.
46. 47.
22 H. 4. 9 &
2 Ma. Bro.
Att. 104. 18
H. 7. Kelw.
rep. 51 a.
ſo held p.
31 El. in
ſcaccar.

R. 2

may

may be the difference, viz. that if the assets be found to be in the County where the trial is, there the Sheriff of that County cannot returne *Nulla bona*, without adding that the executor hath wasted: but if there be no verdict at all touching assets, judgment passing against the executor upon a demurrer, confession, *Nihil dicit*, or the like; there may the Sheriffe make such a return of *Nulla bona Testatoris*, without returning any devastation: and so also where the verdict either findeth assets generally, not finding in what place they be, or expressly findeth them to be in another County, as a little before we found, may be done by a Jury of London, of assets in *Essex*.

In King *Hen.* the eighth his time, as a little after the said *Chichester*, is by the Lord *Dier* reported, the Sheriffe returning upon the *Fieri facias*, that the executors had no goods of the testators, did adde in the same returne that one of the two executors had wasted, and thereupon a *Sci fac.* was awarded against him, & upon *Sci. faci.* returned, & default made, execution was adjudged, and awarded against his goods only, and this course of *Sci fac.* both the *L. Dy.* (as elsewhere I find it reported) & *Prisot. temp. H. 6.* approved. But

So if the
proces for
execution
go into ano-
ther County
than where
the verdict
found, as the
difference
was held in
Scac. 31 El.
28 H 8 Dy
30 b
Pal. 4 H 8
rot. 403. 4
El. Dy. 310
But 2 H 6
12 without
any *Sci. fac.*
upon the de-
vast. retur-
ned, a *capias*
was award-
ed by the
Court; and
see 9 1 37
Bro. Ex. 37
& lib Intr.
322
A *Fieri fac.*
absolutely
and without
condition.

I am perplexed with doubt what plea the Executor coming in upon the *Scire facias*, could plead; for except his denial of wasting might be pleaded contrary to the Sheriffs returne, and put in issue, so as to cause a new trial after a former, perhaps preceding judgement, which I think would not be admitted, then his coming in is to little purpose for ought I can conceiue. Here againe it must be observed that in the case of *Chichester*, the judgement was had upon trial of fully administred; but in the other case in the time of King *Henry* the eight, it was upon confession, which is all one, as I take it, with condemnation upon *Demurrer*, or *non sum informatus*, or trial upon *Non est factum*, to the Bond or a release to the Testator, or the like. Now between all these, & that of *Chichester* there is a broad difference, for there the defendant being convinced by verdict to have Assets, which if they continue not in his hands in kind, must be answered out of his own goods as wasted, therefore the *Fieri fac.* to levie the debt of the Testators goods, if any found, or in default thereof out of his own goods, is very agreeable, & pursuant; but in none of the other cases is there any such trial or conviction of the defen-

R 3

dants

So 9 H 6. 49
50. A ma-
nuscript re-
port.
36 H 6. f 3
& Mordant
12 H 7.
Kalw. rep.
24. But Va-
valor Just.
& all the o-
ther Serje-
ants & cont
2. Bl. D. 185.

Co. lib. 3 fo.
31 Mit. 41
Rhz. red.
241
Co. lib. Intr.
259 b. A
recovery of
debt proce-
dure was
pleaded :
Pl. replied
null tiell re-
cord, and
def. would
not main-
tain his
plea. Ideo
condemp. If
neither, he
must so re-
turne and
do nothing.

dants having assets, so as it rests *aque
dubium*, whether they have assets or not,
and therefore it may seem somewhat hard
and harsh to send out such a writ in that
case, and so should I have thought, if I
had only seen the report of *Petrifera's* case;
But looking into the Record, and finding
the condemnation there to be by *Nihil
propter*, in effect, I cannot uphold any distin-
ction of course in respect of the said differ-
ence of cases. Nor indeede doth that
course there directed presume that the
executor either hath assets, or hath wa-
sted them, but commands that if assets,
&c. then the levying shall be one way; if
wasting, then another way, so if neither
Nihil pend.

CHAP. XIII.

Of an Executor of his own wrong.

TO begin with some definition, or de-
scription of this man; He is such as
takes upon him the Office of an Executor
by intrusion, not being so constituted
by the Testator or deceased; nor for
want

want of such constitution substituted by the Ordinary to administer. Touching whom we will consider in these parts, and with this method, *viz.*

1. What acts or intermedlings of such an one not being executor nor administrator by right, shall make him to become an Executor by wrong, *vide* 5. more per stat. 43 E. cap. 8.

2. In what manner, and by what name such shall be sued, specially when another then he is executor or administrator, or himself after such act becomes administrator.

3. How far he becomes liable to creditors, and how, and to whom.

4. What acts done by him shall stand firm as if he had been an executor by right.

5. See a late stat. 43 E. cap. 8. hereabout.

As to the first, it was in the time of Queene Mary doubted, and not resolved whether the openly seising, and taking into ones hands the goods of the deceased did make one Executor of his own wrong without any further act. And in the beginning of the late Queenes time, the Lord Dyer said that the possession, & occupation of or meddling with the goods is that which gives notice to Creditors,

R 4

1 And 2 P.
& M. fod.
Dy. 103 b.

1 EL Dy. 166
& 167 So
also Balkn.
50 Ed. 3.9

tors, whom they are to sue as executor, But doubtlesse creditors must look further before suit, for else can they not know whether he so intermedling be executor or administrator, nor consequently how to found their suit rightly, and safely for good successe, since a suit against an executor as administrator, or against an administrator as executor, will prove ruinous and fall to the ground. Yea where an Administrator sued as executor did not plead that administration was committed unto him, but generally denied that he was executor or administred as executor, the Lord Dyer held that it must be found for him, yet lest it doubtful: but the cleer and safe way had been to have pleaded the administration. &c. And in the former case the Lord Dyer said, that one intermedling onely about the funeral, and laying out money therefore, an overseer or conductor, or he who hath Letters of the Ordinary *ad colligend. viz.* to get and keep the goods in safety, and one who intermedleth by vertue of a wil truly made, but controlled by a latter wil after found and proved, may free himself from being an executor of his own wrong by special plead-

13 & 14 El.
Dy. 305, 306

1 Bl. D. 366
& 167 see.
lib. intra. f.
322 b.

pleading how or in what right he intermedled, and traversing his administering in other manner; and that this traverse need not, nay may not be, was held in the time of King *Henry* the 6th and 7th, for that such acts amount not to any administering at all: and where no administering at all is confessed, such a traverse of not administering in other manner is dissonant, and not legall. But let us look back upon these severall points exempted by the Lord *Dyer*, and we shall see some cautions necessary touching them, and their safe entertainment. First as touching the point of burying the dead, it must be understood to be with some expence of the deceaseds goods, and so it is expressed in the said book of *Hen.* the 6, his time: else for a man out of charity to lay out of his own mony (not intermedling with the goods of the deceased) to bury a friend, hath little colour to involve him so doing in an Executorship by wrong; taking the case then that such person laies out or expends of the deceaseds goods or mony upon his funeral, heed must be taken touching the measure and proportion whereabout; though I can give no particular and distinct limit, yet doubtlesse

12 H 6 28
10 H 7 28
Yec lib. In-
tra. 321 b
where he
confessed
about func-
rall he tra-
versed aliter
Lib. Intra.
322 where
by letter
ad collig.
Hec travers-
sed 30
Abiq; hoc
quod & 30
exec. should
and, deo
ad, deo
non habebat
lib. 30
non habebat

21 H 6 28

lesse either meere necessity, viz. Church duties, &c. or at least decent sutable-
 nesse to his quality must be the bounds.
 And herein to speake as I think, this latter must either be utterly excluded, or held within very narrow compasse; for what reason, that a Knight or man of higher quality leaving (though perhaps entailed Lands of good value) yet goods not sufficient to pay his debts, should have an hundred pounds or more of that which should satisfie Creditors, spent in pompous intetring of him for his worship, and reputation? Next, overseers may onely be excused for seeking to preserve, and keepe the Testators goods, not in case they expend or dispose thereof. So also for him who is authorized by the Ordinary to Collect, for if he sell or dispose of any (though goods otherwise subject to perishing) it makes him an Executor by wrong, as was resolved in the late Queenes time, notwithstanding that by the Ordinaries Letters, he was expresly directed or warranted so to doe; for it was said, the Ordinary himselfe could not so doe. As for him who administred by vertue of a Will, after dis-
 proved or controlled by a Letter, He
 must

Lib. lat. 321
 8 and 9. fol.
 Dier. 255. A
 256. He sold
 blended
 Corn, but
 there he
 pleaded not
 the special
 matter.

must not doubtlesse stand free, for the goods before administered, but either as rightful or wrongful Executor stand lyable to the Creditors. Nor doth every such intermeddling by one out of all these excuses, and evasions, as would be an administration, make one an Executor by wrong. If one doe but take an horse of the deceased, and tye him in his House or Stable, this makes him not an Executor, saith *Paston* a Justice; So of like acts or intermedlings, as he that delivers to the Wife of the deceased her apparel, at least if it be no more then is convenient to her degree. But if she take, or another deliver more then such to her, she or he becomes an Executor by wrong: But now let us come to a difference, where there is a rightful Executor, and a Will by him proved, or administration committed, for there such light acts or intermedlings shall not make one an Executor by wrong, as where there is no other of right to be sued. As if one take goods wrongfully from such a right Executor or Administrator; this (though he convert them to his owne use) makes him not an Executor by wrong, but a Trespasser to the right-

1 and 2 P. & M. Dy. 105.

21 H. 6. 38.

33 H. 8. 31.

1 Eliz. Dy. 166.

Tr. 37. Eliz.

by Fenner

Just. If one

do any such

act as pulls

the property

out of the

Executor, he

is become

an Executor

by wrong.

If the goods
be aliened
by fraud, he
who takes
them after
the Execu-
tors death is
an Executor
by wrong.
Tr. 37. Eliz.
L. 5. E. 4
72.2.

Tr. 3. Jac. in
com. b.

Co. lib. 5. 33
& 34.

Y. Eliz. D.

156. b.

H. 107. 5.

rightful Exec. or Administrator, who even for these goods, once Assets in his hands, stands lyable to suits or creditors, they being neither lawfully evicted nor rightly administred: but in case there had been no Executor at that time, or no Will proved nor administration committed, then such taking of the deceaseds goods into a strange hand had made an executorship by wrong. And thus was the difference lately resolved, as is reported by the *Ld. Cooke* in the case between *Read* and *Carrier* in the Common Pleas.

Yet this further difference was there held, viz. that although there be an Executor or administrator by right, yet if a stranger take upon him to receive debts and make acquitances, or to pay debts claiming to be an Executor, he is liable as an Executor by this act: and so also in the late Q. time was held by 6. Just. as touching the receipt of debts and making acquitances; but the booke mentions not whether any other Executor then were or not. But in the point of bare payment of debts *Frerick* makes another difference, viz. If a stranger doe with his own money pay the debts of a friend deceased, and not with the debtors: This is but

but an act of charity, and makes him not an Executor by wrong: otherwise, if with the debtors money. Yet to this another difference must be added, *viz.* that if he thus paying with his owne money, have taken into his owne hands goods of the deceased; then is his payment presumed as by or out of the value of these goods, and so makes him an Executor by wrong. Contrarily, if he have no such goods in his hands. And in the point of intermedling with and disposing of the Testators goods where another Executor is, this further difference is to be added or understood, *viz.* That where the goods so taken never came actually to the Executors hands, but were in a remote place, there this taker becomes Executor. For as it were mischievous to the Executor if he should by a possession in law cast upon him stand chargeable with these goods in remote places purloyned as assets in his hands; so were it as mischievous to creditors, if neither Executor by right, nor this stranger as an Executor by wrong, should stand lyable to creditors for them. It is true that the right Executor may sue and recover damages for them, and that so recovered shall be
Assets;

Affets; but the Creditor hath no means at the Common Law to enforce him to sue, and perhaps it may be a cold suit. And with these additions I thinke that late resolved difference may stand firme and sound. Yet in former times without such difference the taking only and possession of the goods of the deceased, was held to create an Executorthip by wrong, as *Belknap* said in the time of King Ed. the 3^d. and especially if the act were such as removed the property of the right Executor, as *Just. Fenner* in the late *Queenes* time said, *Testis meipso.*

50 E. 3. fo. 9.

Tr. 3. Eliz.

How, and by what name suis shall be against such, and the like.

2. Point.

L. 5. E. 4. 72
Co. lib. 5. 30.
31. & 31. b.
21 H. 6. 8.

Touching the second point, viz. in what manner suite shall be against such: First in general, this usurping Executor is not in suit to be distinguished by name from the right Executor, but to be sued generally by the name of Executor of the last Will and Testament of the defunct, and then if he will deny himselfe so to be, he must plead, that he neither is Executor, nor hath administered as Executor: Then the plaiiffe must

must prove that he hath administred in some such or the like sort as aforesaid. And it hath been divers times held, that where there is a right Executor, and yet another doth administer by wrong, it is at the election of Creditors either to sue them joynly together, or one or both of them severally and by himselfe. But if where administration is committed, another also administers by wrong, these cannot be sued together as administrators; for though one may be an Executor by usurpation or wrong, yet none can come to be an administrator by wrong, since no other but such as receiveth that power from the Ordinary can so be; therefore in that case there is a necessity of suing him a part and by himselfe (who so usurpeth administration) by the name of an Executor. So if *A* administer the goods of *B*, not being Executor nor administrator, and after his such doing and disposing of the goods he obtaineth administration of the goods of *B*, but the goods left or coming to his hands since the administration committed, suffice not without the other debts received or released, or goods sold before to satisfy Creditors; now if

Co. li. Intra.
144. but 145
2. in the vepo
dict. he is
called Exe.
De injuria
fi a propria
39 H. 6. 45
46. 21. H. 6. 8
29. 2. H. 4. 14
15. 1. & 2. P.
& M. Dy.
165. 33. H.
c. 38

25. H. 6. 31.

3 R. 3. 20. if any sue *A* by the name of administrator, he shall have no further reliefe then according to the value or extent of the goods left in or come into his hands since the administration committed, and if those be fully administred, he shall get nothing. If they remaine unadministred, but amount not fully to his debt, he must want so much of satisfaction. And if he will be relieved or satisfied out of the goods before disposed of, he must sue *A* as Executor of *B*: and so was it ruled and resolved by *Gawdy* and *Smit*, Justices in the K. Bench in the late Queenes time, viz. Tr. 30. Eliz. And if this now administrator will plead in abatement of this action, that administration was committed to him, and demand judgement if suit shall be against him as Executor, then the plantiffe must in this replication, as I take it, set forth the special matter, viz. how the defendant did administer before administration to him committed. But if one to whom administration is committed do devast, and this administration is by suite repealed, because he was not the next of kinne, and administration is committed to another; now a creditor who would be relieved out of the

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at H. 6. 8. If the Administration were committed before the suit began, the writ shall abate, else not, as was of old conceived.

the goods wasted, must sue that first as Administrator, and not as Executor of his own wrong, said *Popham* Chief Justice; for he did rightfully administer *vid. 8. 185* for that time.

AS for the third, *viç.* how farre this 3. Point.
 Executor of his own wrong, becomes How far li-
 liable and obnoxious to suit; consider able to cre-
 we these things; ditors.

First, he becomes subject both to the action of the executor who hath right to the goods wrongfully intermeddled withal by him, though it were before proving of the wil, and also to the action of the creditor who hath right to the satisfaction of his debt.

Secondly, as touching the measure how far he is engaged, doubtlesse he is not by his wrongful administering become chargeable with the whole account of the Testators debts, but only so farre, and with so much thereof, as the goods which he so wrongfully administered amount unto, (Yet he must look to his plea, else by it he may draw all sued for, upon himself, as if he deny his being executor or Administrator.) And this seemes to mee proved by the case in the time of *Edw.* the third, where the inquest found

Co. lib. Intr.
 144, 145
 Plus de hæc.

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NOT

not only the administering or intermed-
ling by the executor wrongfully, but
found also by direction of the Court (as
it seemeth) what the value was of the
goods so wrongfully administered, which
had not been materiall, if the admini-
strating of a penny had made one as three
Chargeable as the administering of a
pound. Besides, if it be so that a right-
full executor wasting goods of the testa-
tor to the value of twenty pounds, shall
be no further charged than that value,
then doubtlesse so shall it be also in this
case, for both be wrongfull administra-
tions: onely this difference there is be-
tweene them, that in one case the admi-
nistration is by a wrong person, and in
the other case in a wrong manner. Nay,
the Lord *Dyer* doth not stick to call him,
who administred wrongfully, or in undue
manner, expressly an executor by wrong, in
the case of *Stocks* against *Porter*, though
he were rightfully executor, because he
did dispose or execute wrongfully.

1 El. Dy. 167
cap. 12

4. Point.
what acts of
his of force.

AS to the fourth, viz. what acts done
to him, or by him who is an execu-
tor of his own wrong, shall stand firme
and good, as done by or to the right exe-
cutor.

tutor. Suppose, first, that the deceased were indebted to him 20 l. who thus usurpeth executorship, whether may he pay himself or not? And this point was in debate in the Kings Bench between *Coulter & one Ireland*, executor of *Hunt*, where it was strongly objected, that notwithstanding the rightful executor or administrator might punish him, and recover against him for the goods which he administreth; yet another creditor suing him as executor generally, and so affirming him to be (for there is no speciall form of writ or declaration to distinguish an executor by wrong from a rightful executor) hee stands as against him in the state of a rightful executor, and therefore may first pay himself before he pay others; and of that mind at the first were *Fenner & Gandy*, Justices, yet did they admit that this payment should not stand good, as against the rightful executor or administrator. And *Popham* and *Clinche* held strongly that neither should it stand good against other creditors, for then every man would rush upon the testators goods and be his own carver in payment: And whereas it was said at the bar, that the Lord *Anderson* upon an evidence at

M. 40. 41 H
Co. lib. 5. f

39

Guild-Hal had ruled it otherwise, *Popham* at another day of debate of the said case, related, that the *L^d. Anders.* did deny that he ever so ruled, or was of that opinion; & further informed that both he and Justice *Walmsey*, *Periam* and *Clark*, Barons, did agree with *Popham* and *Clinch* in opinion. After which, Justice *Gawdy*, as also *Fenner*, if I mistake not, changing their opinions, and concurring with the rest, judgement was given accordingly. In the debate of this case, question was made if such an executor by wrong pay a debt to another creditor by specialty, whether this shall not stand firm and good, since he stands liable to creditors so far as the goods by him administred doe amount, and it was agreed by the better opinion at least, that this should stand firm and good, so as if the payment were out of his own goods, he might retain to himself in lieu thereof so much of the goods of the Testator; for here he doth not, as in the other case, advantage himself by his owne wrong. Yet that opinion allowing this paiment to creditors, must, as I think, be understood with this difference, *viz.* that this payment shall stand as against other creditors, but not as against the right

right Executor or Administrator, for then any stranger might usurpe the office of executor, and take from him that liberty and election to prefer which creditor he will in first payment; yea, might take from the executor power to pay himself before other, in case there were a debt due to him, which were very unreasonable.

*Of addition and alteration by the statute
43 Eliz. cap. 8.*

WEE having considered what the *5. Point.*
Common law is, and willeth in the premises, Let us now see what alteration or addition a late statute hath made. In the last Parliament of the late *Qu. Eliz.* consideration being had of subtil getting into mens hands goods of an intestate by deed of gift, or letter of atturny from one of small or no ability, to whom such subtile contriver hath procured administration to be committed, and so himself would stand free from the suit of Creditors, the Administrator himselfe either not being to be found, or not being of any value to satisfie creditors. It was therefore enacted that every person, receiving or having any goods or debts
S 3 of

of any intestate, or any release or discharge of any debt or duty belonging to him upon any fraud as aforesaid, or without consideration of or more the value (except in satisfaction of some just, and principal debt to the value of the goods or debts due from the intestate) shall be charged as Executor of his own wrong so far as the value of those goods and debts amount, deducting all principall just debts to him due, and payments by him made, which a lawful executor ought to have paid. Here have wee a touch of all the parts precedent, or at least three of them.

1. We have first a new executor by wrong, though intermedling under the title of an Administrator.

2. We have a limit of the charge by him incurred suitable to our former expression.

3. Lastly, we have to him an allowance of debts owing to himself or due by paid to others, which is more then we have conceived allowable to another Executor by wrong.

CHAP. XV.

*Of pleas by Executors, and which be best,
which most prejudicial to them.*

SINCE amidst the Pleas pleaded by executors there is such difference as that some induce one kind of judgment, some another, some drawing more losse and burden upon Executors then others: Let us consider of the differences, so as light may be taken to choose the safest or fittest for each case.

If an executor do utterly estrange himself from the executorship; saying that he was never executor, nor ever administered as executor (for that must be added) then if the issue be taken upon the plea & it be found against him; the plaintiffs shall have judgment to recover not damages only, but even the debt it self out of the proper goods of the executor, if none of the testators can be found to satisfy it. And this shall be thus not only where it is found that the defendant was made Executor by the wil, & proved it, and so could not chuse but know it, but even also where

plea; deny
ing the Ex-
ecutorship

21 H 6. 19,

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Bro. 62

2 B 4. f. 4

19 H 7. 15

Lib. Intr.

322, 333. 33

H 6. 33. 34

he had never proved the Will whereof he was made executor, nor ever administered by vertue thereof: yea though he did before the Ordinary refuse to be executor of this will, or to intermeddle with the execution thereof; yet if any other named executor with him did prove the Will, or did not refuse to be executor, let such other refuser take heed of pleading that plea. For truth is against the first part of his plea, viz. that he never was executor; and so the verdict which must be *veritatis dictum*, must needs passe against him, and make his own goods lyable as well to debt as damages. What if no other were made executor but this onely who refused before the Ordinary, may he safely plead that he never was executor? I thinke not, since he so was executor before his refusal, that he might have released all debts due to the testator, and given away all his goods, therefore I thinke he must plead specially, shewing his refusal, & not generally deny his being executor.

He was suitable as soon as the Testator was dead.

Nay admit he never was once named, made or intended to be made executor, yet having pleaded this plea, that he never was executor nor administered as executor, if it shall be found by verdict that he

he did adminifter or intermeddle as executor, the fame blow or burthen falleth upon him, for then the latter part of this Plea is found untrue, yea the whole upon the matter, for by this adminiftring he became an executor of his own wrong, and the denial of this executorship by wrong or ufurpation fhall be as penal to him as the denial of a rightful executorship. The like Law where the executor pleades a release made to himfelf, or a payment of the debt or other performance of the condition made by himfelf. Nay I find in this latter cafe the judgment entred generally againft the defendant, as againft another, for his own debt, not being executor. And the reason why the Law makes thefe fo penal to an executor is, becaufe his Plea is not only falfe, but the falshood thereof was wilfull, fince it muft of neceffity be known to himfelf to be fo. And laftly, for that all thefe Pleas, if they had proved true, had bene perpetuall barrs, at leaft againft the defendant: the firft indeed had not bene a barre againft another being in truth executor or adminiftrator. But if the executor had pleaded a release made to his teftator, finding fuch a one among his writings which

But if hee
did it as
Adminiftra.
it is other-
wife; yet fee
that Speci-
ally pleaded
Co. lib. Inrr.
148. 2.

Sec. Co. lib.
Inrr.
Judgment
fo entred,
fol. 148. b.
Read and
Cassers cafe

Co. lib. Inrr.
39. a. not
firft de bo-
nis teftatoris
fi, &c.
See Bro. Hx.
23 thefe rea-
sons for this
diff.

33 H. 6. 23
24

So of other
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Lib. Int. A
123. 2
E 4. 1. 7
E 4. 8 Sec
Bro. Ex. 21
that the
Book con-
trarily re-
ported 34
H 6. 22, 23
is erroneous,
as was de-
clined by
Fitz. 21. 2
23. H 6
the Record
being not so
as the book
saith the
judgment
was.

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20. 2. 2
20. 2. 2

which yet was either forged, or never both sealed and delivered by the plain-
tiff as his deed; or if he plead payment made by his Testator, neither of these Pleas found against him shall cause the judgment to fasten upon his own goods: so if he denied the Bond or Bill, where-
upon the Suit is grounded, so be the re-
stators deed. For in all these cases the truth being not knowne to him, he might honestly and reasonably conceive it to be as hee did plead. But what if hee plead fully administered, and this bee found against him, which rested in his own knowledge? shall not this false Plea expose his owne goods in defect of his Testators to the satisfaction of this debt? no, it shal no, for that though this were a false plea, and that within his own knowledg, yet was it not a perpetual bar, for if it had been so found as was pleaded, yet assets coming after to the hand of the Executor, the plaintiffe should then have relief and satisfaction out of these since accrued assets. If any ask how assets may after come, I will give him two or three instances. First, it may be by recovery of debts before withhol-
den, or of damages for goods taken away,

or

or by voluntary payment of a debt not before due; for that the time of payment was not come. Secondly, if the Testator having a Lease for twenty yeares, did demise the same to J. B. for the whole terme, if he so long should live, if he were alive in time of the former year, but now is dead, the terme expiring, this is now Assets which before was not, whilst it was but a possibility of a terme. Other instances might be given, but these may suffice. If the Executor pleaded that the Testator stood bound in such a statute, or that there was such a judgment against him of debt to the King beyond the satisfaction whereof the goods would not reach. This is in effect a fully admitted, though special, and not general, and the Law is alike (as I take it) in all these cases as to the not making of the Executors goods lyable. But in all these cases though the debt shal not be adjudged upon the Executors owne goods, yet the damages shall, in default of the Executors goods to satisfie them. And in these cases it is not material whether the judgment passed upon trial or demurrer. Nay if the defendant Executor plead no plea, but confesse the action generally,

or

Lib. Intr.
148. 149.
This good,
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no averment
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Co. Lib. Intr.
152.
11 H 4.5.
There a cap.
ad sat. was
awarded for
the dama-
ges.

miscarriage after their departure from the Barre were fined; I finde that the plaintiffe renouncing the assessement of damages by them made, and praying the Court to asseffe the same, it was done accordingly: but this was a special case.

Whereas we before shewed that an Executor denying his Executorship, shall if it be found against him, pay the debt of his owne goods for his false plea; This thereabout occurreth to be added, viz that that is only where the immediate executorship of the defendant is denied. For if B be made executor by A, & B dying makes C his executor; now if C be sued for the debt of A, as executor of B executor of A, and he denieth that B was executor of A, which by consequence is a denial of his being now executor of A, yet if this fall out in trial against him, he shall not in his own goods stand liable to this debt; because it is possible that he might not know to whom his testator was executor. So if A made B, C. and D his executors, and E is sued as executor of D the surviving executor of A, if E deny that D his testator survived B and C, by consequence whereof he denieth the truth, viz. that the executorship of A is de-

M. 32. H. 6
Ro. 2. 321
Lib. Intra.
329. a.

See lib. Inc.
323.

devolved to him, yet shall not this found against him, charge his owne goods, for he might be ignorant of this point in fact, *viz.* whether *B, C,* or *D* lived longest. And here he denied not his own immediate Executorship, but a mediate or more remote Executorship, and so I think is the Law where *C* being sued as Executor of *B*, Executor of *A*, he pleads that *A* by a latter testament made him selfe Executor, which is found against him, so as here he falsly pleaded, and pretended himselfe to be the immediate Executor of *A*, and so denied the mediate Executorship, *viz.* of *B*, to *A* and of him to *B*. Yet *Quere* of this, for why should not as well his false making himselfe an Executor immediate to the indebted *Petitor* charge his owne goods, as well as his false denying of that Executorship, since both pleas tend to the overthrow of the plaintiffs action, and each equally rested in the defendants knowledge? But this difference is between them apparent, *viz.* that the denial of Executorship, if true, is an utter, and perpetual Bar to the plaintiffe, as against him so pleading, but the affirming of an immediate Executorship, where he was sued

sued as Executor mediate, doth, not, so, if true, but directs the plaintiff to a better writ or action, viz. against him as immediate Executor to the indebted Testator.

Where we have before touched upon the coming of Assets futurely to Executors, I thinke it is not amisse to consider a little the forme and frame usual in pleas of fully administrated, which thus runne, viz. *Quod die impetr. & plene administravit omnia bona & catalla que fuerunt pred. S. temp. mortis sue, & nihil hab. de bonis, &c. que fuer. pred. S. temp. mortis, &c.*

Lib. Int. 136.

Then tying his denial upon the things which were the Testators at the time of his death; What if then the Executor have at the time of this plea pleaded goods, which were not the Testators at his death, but since accrued, as before is shewed, or perhaps a Lease for yeares sold by the Testator upon condition to be void, if five hundred pounds not paid at such a day, which hapning after the Testators death and default made, the term is returneth. Or if the Executor by a Writ of error reverse a judgement given against his Testator for two hundred

7 H 4. 39
Bro. 50 This
plea is not
good, per
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some may
have since
accrued.

dred pounds, and so is restored thereunto: May the plantiffe now reply generally that he hath Assets which were the Testators at the time of his death? How can the Jury so finde, when the truth is not so? Surely this case is not common, nor can I shew a president of a special plea therein. But in reason me thinks it should be specially and not generally pleaded and set forth in the replication. And in case where one sued as Executor, denieth that he was ever Executor or administred as Executor; I find sometimes the replication general, that he did administer without shewing wherein or how; and sometimes special, shewing what thing was administred and where. Here note, that the Executor defendant denying (as he must) two things, viz. 1. That he never was Executor; 2. That he never administred as Executor, the plaintiff in his replication is tied to maintaine but the one of them as the truth of the case is; that is, if in truth the defendant were made Executor, but never did administer: now it must be replied that he was made Executor at such a place, without speaking any thing of his administering. On the other side, if he did ad-

Lib. Intra.
322. a. b. but
a place must
be shewed.
So 21 H 6
19, 20. Br. 42

administer, but were not made executor, then only the administering is to be replied; but if it shall be found that the defendant had administration to him committed, and so administered by vertue thereof, then is the verdict to passe for the defendant, for this is no administering as executor, and upon a general denial thereof this may be given in evidence, as the Lord *Dyer* reports to have been resolved. But if the plaintiff do in his replication maintaine both the points, shall this make his plea double? Me thinks it should, yet I find it so replied, and no exception taken for the doubleness. *Tr. 17. H. 8. Rot. 28.*

Sodome Co.
li. Intr.
144. b

Mich. 13 &
14 El. Dy.
305.

Lib. Intra.
312 b.
Tr. 37. Eliz.

A sole woman being executor, maketh a deed of gift of the testators goods in trust, but continueth possession of them, and marrieth *I S*, who also hath possession of the goods, and in an action of debt by a creditor fully administered is pleaded: now upon evidence the verdict shall passe for the plaintiff; for this alienation being fraudulent was void as to all creditors, and so as to the plaintiff the goods continued the testators, and so assets in the defendants hands, as was held in the Kings Bench. If fully administered be
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pleaded

Yet *Finch*
46 B 3 f. 9
10. held the
contrary,
viz. that
judgement
should be of
the whole,
but executi-
on only for
so much, and
a Scire fac.
for the rest
when more
assets.

Sec. Cooke
18. fol. 134.

pleaded where the defendant hath assets for part, but not sufficient for all, and so it is found, yet shall not judgment be given for the whole, but for part presently, with a further award, that when more shall come to the executors hand, the plaintiffe shall then have further judgment for the rest, so as that false plea doth him no prejudice, but makes him in as good state (the charges of trial excepted) as if he had confessed himself to have part. And I think the plaintiffe upon that confession of part, may pray the like judgment, without maintaining that the defendant hath sufficient for the rest; for if that be not true, why should he be put to the charge of a trial by Jury? yea, Sir *Edw. Cooke* at the Bar, *Tr. 36 Eliz.* said, that where folly administered is pleaded, the plaintiffe is not tied to maintain the contrary, but may presently pray and have judgment to recover it when assets shall futurely come to the defendants hands, which was denied by some; but truly me thinks the Law should be as he said, as well as in the former case, where for the part which the defendant had not assets to pay, it so was done upon verdict so finding. But there, as I conceive

ceive, it was not a present judgment, but an award that he should have judgment futuramente; so as after when assets come to the defendants hands, the plaintiffe must have a *Sci. fac.* against the defendant, to shew cause not why hee should not have execution, but why he should not have judgment, as I tak it; yea, where it is found for the defendant, that he hath fully administered, yet was it held by all the Justices, 33 H. 6. 23, 24. and by *Prisor* 34 H. 6. 24. that when assets after come to his hands, the plaintiffe shall have a *Scire facias* to have satisfaction out of them: but there *Markham*, *Yelverton*, and *Forresten* were of contrary opinion, and so was the whole Court, 4 Hen. 6. fo. 4. And it stands with great reason that whereupon a verdict fully found against the plaintiff, judgment is given *Quod nihil capiat per breve*, there he cannot have any writ to execute the judgment for him, but is put to a new action of debt; yet where it is found that the defendant hath assets for part of the debt, but not sufficient for the whole, there it is very congruous that the plaintiff have presently judgment for part, & after when more cometh, then by *Scire fac.* against the defendant, obtaine

So 19 H. 6
f. 37. 8 E 4
fol. 25. See
judgment
so entered
Co. lib. intr.
151. b.

So 7. E. 1. f. 9

judgment and execution for the rest; for here both verdict and judgment were for the plaintiff against the defendant, whose plea, that he had no goods, was false, and so found by the Jury. And this difference was strongly avowed by Serjeant *Hanham*, Mich. 33, 34 *Eliz.* and after approved by *Fenner Just.* 36 *Eliz.* none contradicting it: yet a book was cited, that the plaintiffe recovering so much as was found in the executors hands, should bee amerced for the residue, which *Popham* Chief Justice denied to be law.

It is 31. H. 6.
4041

CHAP. XVI.

Where judgment shall be against the executors own goods, though no plea of the defendant nor vastation do so occasion: and of the severall manners of judgment in several cases.

HOW by wasting, called by us commonly, a *Devastavit*, an executor may draw downe the execution upon his owne goods, hath formerly been handled and discoursed of, as also what kind of

of pleas doe make the executors owne goods liable to the debt, and what not. Now let us see where without mis-admistring or mispleading, yet the nature of the action shall lay the whole debt or thing recovered upon the executors own goods. And this we shal find in some few cases; 1. Where an executor is sued for rent behind after his testators death, upon a lease for years, made to the testator, and by him left to his executor. Here it shall be adjudged and levied upon his owne goods, for that so much of the profits as the rent amounted to shall be accounted as his owne goods, and not his testators, therefore is he to be sued as well in the *Debet* as in the *Detinet*, where in other cases he is not, but in the *Detinet* onely, being sued as executor. So if any thing delivered to, or detain'd by his testator come to his hands, and he still detains the same after the demand, and be thereupon sued in an action of detinue; for this is his owne act: Nor in this case need he to be named as executor, for he shal not answer damages for his testators detaining. So if he assume to pay of his testators, having assets, and be sued upon this *Assump.* the which debt is to be recovered in dami-

5 Mariz fol
112

Reade and
Nerwoods
case.
Co. lib. Intr.
fol. 1, 2

ges, and that upon or out of the execu-
tors own goods; yet is this action and
the assumption which is the ground ther-
of, founded in the Executorship, and
his having assets; for if either he had not
been executor, or if he had not assets
at the time of the promise, it had beene
Nudum pactum, & would not have bound
him, nor given good cause of suit. Nay, to
goe further, in the case of assumption by
the testator, and suit against the executor
thereupon, we find the Judgment in *M.
Plowdens* Commentary given against the
executor generally, as if he had not been
an executor, not fixing it upon the te-
stators goods; yet there the very debt it
selfe is included in the damages. But
contrarily was it after in the seventh year
of the late King, viz. Judgment given,
that as well the damages as the costs
should be levied of the testators goods, if
so much in value of them were in the de-
fendants hands; and if not, then the costs
only of the goods of the executor. And
this surely is the righter and more just
way, for there is no reason, that upon a
promise more then upon a bond, the Law
should cast the whole debt upon the back
and state of the executor. But perhaps the
two

two judgments may be reconciled thus, the latter was given upon a verdict, *Non assumpsit* being the issue, and there the Jury assessed damages in certaine, viz. 253 pounds with the costs. So as here the judgment was compleat and full viz. to recover the said sum; but in the other case the judgment was had upon a demurrer, so as the damages not being knowne, it was generally that the plaintiffe should recover his dammages against the defendant. *Sed quia nescitur qua damna &c.* because it appeareth not to the Court what the damages were, therefore a writ was awarded to enquire of damages upon the return whereof executed the judgment was fully and compleatly to be given of a summe in certaine; which second judgment it appears not by the book in what manner it was entred, and therefore might perhaps be then agreeable with the other. And that the said first judgment before damages enquired of, is not a plenary and full judgment, but an award of judgment, hath been divers times resolved, and that therefore any defect and insufficiency in the declaration may bee shewed time enough after the first, & before the second judgment. Yea,

T 4

if

Tr. 30 Eliz.
Pasch. 33 Rl.
in com.
banc.

if the plaintiff die before the second judgment, though after the first, the action falleth to the ground: So if the defendant die: otherwise of death after full judgment. But this notwithstanding, and howsoever it there were done upon the second judgment, me thinks it were righter and fitter, that the first judgment should expresse that the damages should be had and levied out of the testators goods, for whom and in whose right the Executor is sued.

So for rent
behind since
the testa-
tors death.
Co. l. 5. fo. 31
the suit is in
the debt as
for his owne
debt, M. 14
& 15 Eliz.

Lib. Ingra.
329 a. & b.
De terris &
patallis, &c.

Another case there is wherein the judgment must be, as it seemes, against the executors owne goods, viz. in an action of covenant for a breach of covenant since the testators death; for so was it held both by all the Judges of Common Pleas, except the Lord *Dier*, and by the prothonotaries in the late Queens time, where the case was of an house upon the lease, negligently burned in the executors time, for which damages only were to be recovered. And sometimes where the executor himself is so to bear the burthen, I find the Judgment entred, that the sum recovered shall be levied of the lands and goods of the Executor.

CHAP.

CHAP. XVII.

Of Women covert Executors.

THERE being two kind of persons who have some disability upon them, viz. *Feme coverts*, or married women, and infants; touching whom we find in many places question and disceptation in our bookes: we will consider of them by themselves, or apart from others, yet not joyning them together neither, but each by himself separately.

First, therefore of *Feme coverts*, touching whom we will consider these three things:

First, whether they may make Wills and Executors, with or without their husbands assent, and how, whereof, and in what cases.

Secondly, whether they may be made Executors without their Husbands assent, or how their Husbands may hinder it.

Thirdly, what acts in execution of the executorship they may do without their Hus-

husbands, or their husbands without them.

Seft. 1.

*Solus secre-
ta exomina-
ta.*

Debts ex-
cept, which
are not pro-
perly good.

5 E 2 Fitz.
Devise. 24.

A woman married, or feme covert, we know is *Sub potestate viri, cui in vita contradicere non potest*, as saith the writ given by the Law to the wife for recovery of her Land after her husbands death, being aliened by him. Therefore it is that Judges, when a woman is to acknowledge a fine of any Land, do examine her apart from her husband, to know whether she be willing, or come to doe it by the compulsion of her husband. It is therefore hard for her to have freedom of will, and consequently freedom to make a will. Besides, all her moveables or goods personal, which she had at the time of her marriage, otherwise than as executrix or administratrix, are by the Law totally devided out of her, and settled in the husband as fully, *ipso facto* upon the very marriage, as any other that were his own before: Of these therefore she can make no disposition, no more then of other her husbands goods. But in case she doe by Will bequeath them, although the Will and gift be void, yet if the husband, as the case was in the time of *Edward* the second

cond, doe after his wives death consent to this her will and gift, by delivering of the goods bequeathed after her death, or assenting that the legatee take them by vertue of such will and gift; this amounteth to a new gift by the husband. If a woman have a Lease, an estate by extent, a wardship, the next avoidance of a Church, or other chattel real; these are not devested out of her into her husband by marriage, but in case she overlive him, they continue to her as before; no alienation or alteration having been made by the husband, who had power to dispose of them by gift in his lifetime, though not by his will; yet such a woman in her husbands life-time could not, of or for these things, without her husbands assent, make an Executor or Will, but she dying before him, they would, by the operation of Law, accrue to him. And here then observe a case, though not frequent, yet full of mischief when it happens: Suppose that a woman indebted a thousand pounds, and having Leases and moveable goods to the value of three thousand or foure thousand pounds, marrieth with I S. and then dieth before the debt be recovered a-
gainst

During her
life he is, but
not after.

But the hus-
band may
receive the
or release
them.

13 H 7. f. 32.
The hus-
band was
sued in Spi-
rit. Court as
executor to
his wife. So
she is often
to former
husband &
to father,
&c.

gainst her: in this case the husband shall have and goe away with all this value of his wife, and is not in Law lyable to pay one penny of her debts, because he is neither her Executor nor administrator: What the Chancery could doe, or rather what the Lord Chancellor or Lord Keeper would doe in this case, I will not take upon me to say or determine. Another sort or kinde of goods, or rather interests a woman may have, viz. debts or things in action, which as the former are not devested out of her by marriage into her husband, nor yet can she thereof make an Executor without her husbands assent, although they be one degree farther from the husband, then the said chattels realls; for that though the husband doe overlive the wife, he shall not be intitled to them as to the former: But if his wife make him Executor, as she may, or if after her death he take administration of her goods, then as he is thereby intitled to them, so is he liable also to pay her debts out of the same, when he shall have received them.

Lastly, *Data*, that a woman covert is executrix to some other person, and in that right hath good moveable; these are

are not devided out of her, because she hath them not meerely to her own use, but as representing the person of another: But whether then may she without her husbands licence or assent in respect of her being an Executor, and for continuation of this Executorship, make Executors, and consequently a Will or not? Hereabout hath been much diversity of opinion: Some bookes generally speake that the wife may make an Executor, but speake nothing of the husbands assent, whether necessary or not. Elsewhere we finde it mentioned, that if the husband after the wifes death countermand (some books false printed say command) the proving of his wifes will, then it loseth all force, or becometh void and of no value: but in this case is no mention in what state this wife stood, viz whether she were Executor or not, no not so much as whether she had any thing in action, or chattel real or not, so as nothing in particularity can be grounded upon that case. But there are expresse opinions that the husbands assent is absolutely necessary even in this case, so as without it the wifes making an Executor shall be meerely void, and consequently,

29 H 6. f. 37.

34 H 8. S.
Bro. Testa-
ments 21.

18 E 4. f. 11.
Vavasor
Just.

quently, he to whom she was Executor, shall now by her death be dead intestate. And of this opinion was *Babington*, chief Justice in the beginning of *Henry* the sixt his time: Yet contrary hereunto was the opinion of *Finewx* chief Justice in the time of King *Henry* the seventh, viz. that where the wife is an Execntor she may also make a Will and an Executor without any consent or assent of her husband. And to this opinion doth Master *Perkins*, after consideration of the books on both sides, incline. But some will say, that since all this, in the late Queenes time this hath been contrarily resolved, viz. in the case between *Andrew Ognell* plaintiffe, and *Underhill* and *Apleby* defendants, in the end of which Case, it is in expresse termes said to have been then resolved, that a Feme Covert or married woman, could not make an Executor without the consent of her husband. To this I answer, that this Case is to be construed with relation *Ad materiam subjectam*, viz. to the matter, and point in question, and under consideration; which was that state of a woman whereof we have before spoken, viz. one having things in action, debts

4 H. 6. E. 31.

13 H. 7. 24. b.

Tiz. de vis. f. 27.

Hill 29. Eli. in Com. ba.

Cook 1. b. 4. 31. b.

debts or duties to her belonging, as there in particular it was arrearages of rent due to the woman before marriage. As for the point of a woman Executor to another person, it was never in that Case under disceptation, no nor once mentioned in the debate or arguments thereupon. Now considering the very form, and phrase of judgments at the common Law, which are thus, *viz. Ideo consideratum est per Curiam, &c.* not *Adjudicatum est*, that is, it is considered by the Court, not in expresse termes, that it is adjudged: This I say well observed (as to me it seemes very remarkable) gives us to know, that no more is adjudged then is considered of, the judgement being contained, and clasped up in the word *Consideratum est*. Wherefore since in *Ognells Case*, the point of a woman coverts ability in Case where she is an Executor, to make a Will and Executor, hath not been considered of, (the eyes, tongues, nor thoughts of the Judges, being not once set upon it;) It cannot be, that that point is there resolved or adjudged. Besides, even in a few words expressing, as to me it seemes, the reason of that resolution, it appears

NOT

not to have been the intent of the Judges, that the same should reach or extend to this Case, of a woman covert Executor: for it is added (as the reason of the judgement in my conceiving) that the administration of the wives goods doth of right belong to the husband, which amounts to this in my understanding, viz. that where the wives making of a Will, and consequently of an Executor, may be prejudicial to her husband, and prevent him of some benefit or advantage, or tend to his losse, and disadvantage, there it shall not be available or effectual without his assent; and therefore not in the Case of her, who having debts or duties to her due, would by making another to be her Executor, exclude or preclude her husband from that benefit, which to him should pertain as administrator of her goods. Now as for the goods, debts or credit to her as Executor to some other pertaining, no benefit could redound to the husband by having such administration of his wives goods, for those should goe, and be to the next of kinne of the wives Testator, taking administration *De bonis non administratis* of him, if she have no
Execu-

Executor, and therefore her making
 Executor as touching these, brings no
 hurt or prejudice to her husband, and so
 is out of the reason of *Ognells Case*. Since
 then it is so, and since the Law favour-
 eth wills, and it was by implication part
 of his will who made her Executor; that
 shee should have power to continue his
 Executorship by making another to suc-
 ceed therein after her decease, for perfor-
 mance of his will; why should the Law
 give to the Husband who can receive no
 prejudice thereby, power to give impe-
 diment thereunto? for *Frustra est innu-
 tilis potentia*, even reason it self frames
 and awards against him in this Case a
Quare impedit, or rather, a *Non impedit*,
 as to me it seemes. Wherefore to con-
 clude, I take it that the opinion of *Finch*
 is good Law in that point of a femme co-
 vert Executor, though not in the other
 point, where she only hath dets, or things
 in action to her self due; for therein the
 said resolution in *Ognells Case*, grounded
 upon good reason, gives me satisfaction to
 differ from *Fin* who making no difference
 between the cases, held the husbands assent
 needless in both. *Posito* then, that the
 wife of *I S* having debts due to her self,
 and

and being also Executrix to *ID*, makes without her husbands assent, *IN* her executor, and dieth; what shall we now say? shall we say, that as touching the goods and credits, or things in action to her as Executrix of *ID* pertaining, this will stands good, and *IN* as her executor may prove it contrary to her husbands will; and that as to the credits to her selfe in her owne right pertaining, the will is void, and thereof her husband may take administration? Shall she die both testate and intestate; with a will, and without a will? shall she have both an executor and administrator? why not, to severall purposes, as well as where an executor is made onely for one particular thing or one place, the testator may elsewhere die intestate: And so where the executorship is divided, as before is shewed, and one to whom part is committed will prove the will, but the other to whom other part of the executorship is committed, wil not take it upon him: here must needs be a dying for part testate, and for part intestate.

Note.

As for the second point, *viz.* wives or women coverts being made executors, and so having the office of executorship put upon

13 Ed. 1. c.
FINN. EXEC.
119.

2 H. 7. 15. b.

2 H. 7. 15

upon them against their husbands will, there hath also been diversity of opinions. In the time of King *Edw. 1.* *Brab.* Justice saith, she may be executor without her husband, and the administration shall be delivered to her only. And I think he meant that this might be without the consent of her husband, or whether hee would or not; for so it is said in the time of King *Henry the seventh* to be the Law spiritual; and indeed in Courts spiritual no difference is made betwene women married and unmarried, for ought I can find. There a wife sueth, and is sued alone without her husband; he intermedleth not, nor is intermedled withall touching the things pertaining to his wife. But at the common Law it is otherwise; and there, as *Bryan* chief Justice saith, a wife without the assent of her husband cannot be executor, hee meaning thereby, that the husband may oppose and hinder it; for such a one may be named Executor in and by a Wil without the knowledge of her husband: let us then see how after the death of the testator, the husband can hinder her proving the Wil or intermeddling to administer, since it may be a matter both of much

trouble and danger to him, to have the executorship fasten upon his wife, and consequently upon himself. On the other side, it may be a benefit and advantage to the husband, and therefore we will also consider whether the husband may (though his wife would refuse) assume the executorship, and fasten it upon her. The testator therefore being dead, & some or common bruit carrying it to the Ordinary, that the wife of *IS* is made executrix; if she come not in *gratis*, or voluntarily to prove the Will, *Process* or a citation is to be sent out of the Spiritual Court against her, to enforce her coming in to take on her the executorship. She coming, may clearly, as well as any other person (especially if her husband concurs with her therein) refuse this office, trust and charge, so as if there be no other executor named, the Ordinary must commit the administration: If she should not come and appear, she should be excommunicate, as I take it, notwithstanding any allegation or intimation by her husband of his unwillingness to have her take upon her the executorship. But suppose she doth come into Court, and offers her self ready to take the Executorship

torship upon her, and on the other side
 her husband expresseth his dis-assent
 thereunto, praying that shee may not
 have the execution of the Wil to her com-
 mitted: what wil then be done? This I
 confesse pertains to another learning, and
 not to that of our possession: but foras-
 much as I find that in the Courts spiritu-
 al a wife stands in the same plight & state
 as a woman sole, the husband not inter-
 meddled withal in the affairs of the wife;
 therefore do I conceive that in that Court
 the husbands refusal wil not be of force
 to hinder the committing of the executor-
 ship to the wife not refusing, at least if
 there come not a prohibition to stay the
 Spiritual Courts such proceeding: but
 whether a prohibition be in such a case
 to be granted or not, as I find no resolu-
 tion in my books, so wil I not take upon
 me to resolve. This stands cleere in the
 rules of the Law of *Eng.* that the wife is
 under the husbands power, and cannot
 contradict him in pleading and doing o-
 ther acts even touching her owne Free-
 hold: nay she cannot take lands nor goods
 by gift or conveyance, without her hus-
 bands assent, as the law hath been, and for
 ought I know, is taken. But if once the

33 H 6. 31

43. 39 Ed.

3. 1

27 H 8. 24

U 3

Will

Will be proved, and the execution thereof committed to the wife, though against her husbands mind and consent, I think it will stand firme; and the husband and wife being after sued, cannot say, that she was never executrix: and I doubt whether the wife administering without the husbands privy and assent, although the Will be not proved, do not conclude her husband as well as her selfe, from saying after in any suit against them, that shee neither was Executor, nor did ever administer as Executor. Yet perhaps this administration by the wife against her husbands minde, wil (as against him) be as a void act, else cannot I see how *Brians* opinion before cited, viz. that the wife shall not be an executor, without or against her husbands mind, can be law. On the other side, if the husband of a woman, named executor, wou'd have his wife to take upon her the execution of the Will, and to prove the same, but she will not assent thereunto (wishing perhaps that gain and benefit rather to some of her kindred by a way of administration, then to her own husband by her executorship, as sometimes wives attord not wel with their husbands) in this case I think

11 H. 6. 4.
The plea is
that the
Femme did
or did not
administer
without
speaking of
the hus-
band.

33 H. 6. 31
The husband
may admin-
ister and
prove the
will for his
wife.

think the Court spiritual wil not fasten the executorship upon the wife against her wil. But *data*, that the husband, though the Wil be not proved, doth administer as in the wives right, but against her minde and wil, shal she be now hereby bound & concluded, so as after she cannot decline or avoid the executorship; and surely I think, that during her husbands life, shee stands concluded at the common law, for that there she shal not be, nor can be sued alone as executor, and then being sued with him shee must joyne in plea with him, *viz.* that she neither was executor, nor administred as executor, and then this act of her husbands given in evidence wil, as I take it, cause that the verdict be found against her; not so after her husbands death: then shee may refuse as the Lord *Dyer* saith, and citeth, as resolved. These things I thought good to offer to consideration, and so leave them without resolution. Difference perhaps may be, where a woman so made executor taketh an husband after the testators death, before either proving or refusing to prove the Wil, and where she is made executor during the coverture, as there in case of a descent of her land to the heir of a dissea-

1 Eliz. Dyer
166 b. there
is cited 3 H
rot. 113.
Nota per
Bill.

for; for when there is upon her such a state of election, she marrying before her resolution or determination, doth upon the matter deliver it into the husbands hands: not so where it first findeth and saileth upon her in the state of coverture; if the husband were indebted to the Testator, this making of the wife executor is as I take it, a release in law, as wel as if she were the debtor, but if after the testators death she do marry such a debtor, it is a devastation.

The third Point.

Touching the administration or execution of the Office of an executor by a Femme covert and her husband.

WE wil now come to admit the execution of the wil assumed by concurrent consent of husband and wife, and the wil proved with both their liking in the wives name; and examine what acts the wife of her selfe is able to do, and what her husband without her.

It hath been conceived by many of old, & by some of late, that if a Femme covert or married woman executrix release a debt of her testator, or give away the goods which she hath as executor, or deliver a legacy bequeathed, it was firm and good

good; and on the other side, that her husband's gift or release was of no value, for that the administration or execution of the will is committed to the wife onely, and some have gone so far as to say that she may sue or be sued without her husband (in the Courts of Common Law, I mean) for in the spiritual Court it is true, the husband is not joined with the wife in suit;) but the law is doubtless in all those points contrary, as not only some opinion also was of old, *viz.* in the time of *H. 7.* but also hath been in the late *Qu.* time resolved: for other wise, if the wives gift or release should stand good, her act might exceedingly endamage her husband, and make his goods liable to the creditors, the testators state being wasted by the gifts or releases of his wife. Wherefore it was held in the said late case, that unlesse due payment were made to such women covert executors, their releases or acquittances be void, and so also their gifts and grants: yea it was then held that the husband of the wife executrix, may give goods or make releases of debts at his pleasure. But doubtless by marriage, neither are the goods (though personal) which the wife hath as executor, devided out of her
and

See 18 H. 6. 4
In debt the
plea shal be
that shee
hath fully
administred;
and replie.
that shee
hath assets,
never men-
tioning the
husband.

33 H. 6. 31

and settled in her husband as her owne goods are; nor if she die, shal they accrue to the husband, if no alteration were of the property, but shall go to her Executor or to the next, of kinne, being administrator of her testator, if she have no Executor; and so was it held in the first yeare of Queene *Mary*: Yet though for any other goods which the wife had in her owne right before marrying, the husband alone without naming the wife may maintaine an action of trespassse; yet touching such goods as the wife hath as Executor, the action must be brought in the names of the husband and wife, to the end that the damages thereby recovered may accrue to her as Executor in lieu of the goods. So also must the replevin for those goods be in both their names. But although the husband be thus named with the wife, yet principally is it the suit of the wife, and therefore in such actions or in debt by husband and wife, she being Executor, if it come to tryal by Jury, the husband being an alian, yet shall he not have trial *per medietatem lingue* or *alienigenarum*, that is, by halfe aliens, as in other cases, where an alien is party to a suite,

M 31. El. in
ed. b. If the
husband be
to avow, it
must be in
the right of
his wife Ex-
ecutor or
administra-
tor *Mansfield's*
case.
Doctor Juli-
er his case.

suit, is to be had. And where to a wife made Executor, power is given to sell Land of the Testators; she may sell to her owne husband, as was resolved in the time of King Henry the seventh, where the Feoffees (it being Land settled in use) were committed to the Fleet, for that they would not execute an estate to the husband, according to the wives state. But of this I much marvel, since the Law intends the wife so under the husbands command and subjection, that it holds not her disposition of land to him by will free, nor therefore of force, and how shall this then be conceived to be but a partial sale; yet *volente non sit injuria*, and he that will put such power into the hands of a woman under coverture, doth in a manner subject it voluntarily to the husbands will. And it hath been held by some, that even an infants or feme coverts conveyance in such case of necessity should stand firm and unavoidable, because of the condition expresse or implied, that the state should be void, if no such conveyance made.

10 H. 7. 20.

Bro. Just.
Cui in visa
15. she may
sell to any
other, but
not to him.

Fenner Just.
in ba. 129.
Pas. c. 37.
El. & 34. E. 3.
Bro. Cui in
visa 15. No
prejudice to
them that it
be good.

Tuck-

The Office of
CHAP. XVIII.

Touching infants, and their making or being made Executors.

BEing now to consider of disability by age, for want of yeares in persons making or being made Executors: Let us first take view of the several ages of men and women to several purposes material in the lawe judgement and respect. And first, touching a woman:

1. *35. H. 6. 41. b* *Wangford* in *Henry* the sixth his time shewes, and other bookes approve that she hath six several ages, respected in and by the law. As first, the age of seven years, for her father to have aid of his tenants to marry her. Next nine yeares to deserve dower, that is, that in case she be of that age at the time of her husbands death, she shall be endowed; but not if she be any thing under those yeares; the Law being Physically informed that a woman at those years may conceive a child, but not under them. But of somewhat different opinion was, as it seems, the Parliament in the late *Q.* time, when it was made felony to have unlawful carnal knowledg of any woman child under the age of ten yeares, it being then conceived

2. *18. Eliz. c. 7.*

ved, as I thinke, that no such could consent. The age of twelve yeares is a womans time for assenting or disassenting to marriage in more tender yeares had. For so it appeares by divers books, although Mr. *Littleton* have here no distinction between male and female. The age of fourteen years is a womans time to be in wardship or not, so as if she be any thing above those years, at the time of her ancestors death, she escapeth wardship. The age of sixteen years is her time of coming out of wardship, being once fallen under it; for although had she been full fourteen, she had escaped it; yet not so being at the time of her ancestors death, her wardship lasteth till sixteen years, except the Lord shall sooner marry her. And lastly, the full age of a woman whereby she is inabled firmly and unavoidably to make grants or conveyances is 21. years, as well as for the male, before which time, be it that she being sole, make a feoffment or other conveyance, or being married alien her land by Fine, and her husband of full age joyn with her, yet is it infirm and avoidable.

Now of the male, or man, the first age material and settledly resolved on,

is twelve yeares, for at that time each male is at the Leet to sweare his fidelity to the King; this women doe not, and therefore are they never said to be outlawed, but to be waived, because they have not this admittance into the Law which males have. This hath been, as I thinke, the ground of that speech, That women are lawlesse creatures.

2. The second age of males is fourteen yeares, accounted by the Law, the age of discretion, especially material to two purposes, viz. First, that if one under that age commit an act amounting to felony, yet is he to stand free from the attainder and punishment incident to a felon: Regularly it is thus, but *non est regula quin fallit*, one of much lesse years having attained ripenesse of discretion and discerning, shall incur the like attainder as one of full age, as was resolved in the time of King Henry the seventh, touching an infant but of the age of nine yeares, who having killed another boy of like age with his knife, and then hiding the slaine boy, and excusing the blood found upon him, by saying that his nose had bled: It was held by the Judges that he was to be hanged as a felon,

3 H. 7. c. 1. 6.

felon, his such non-age notwithstanding. The other point, touching which this age of fourteen yeares is especially material, is touching an heire of Lands held by Socage; for in case such heire be under that age, he is to be in ward to the next kin; but if he be of that age, he is not to be in ward at all, for that the Law judgeth him to be of discretion at those yeares, and therefore a Guardian in Socage being in effect but a Bayliffe accountable, he hath no need of such an one, other then such as himselfe shall chuse.

The third age in and touching males material, is fifteen yeares; for every Lord of a Manour, or one having Freeholders in Socage, or by Knights Service, when his eldest Son cometh to that age, viz. fifteen yeares, is to have of them ayd for the making of him a Knight, towards which every one holding by a whole Knights Fee is to pay twenty shillings, and so ratably for more, more; and lesse, lesse: and each holding twenty pound Land in Socage is to pay the like sum, and so ratably for more or lesse.

The fourth age of males, is the full age

3.

4.

age of one and twenty yeares, which maketh him free from wardship, having Lands held by Knights service descended unto him : And also makes him able to alien Lands or goods, makes firm his bonds, statutes, recognizances, &c. for although at fourteen the Law judge him of discretion, yet doth it not hold him fully ripe till one and twenty.

5.

Oblitum.

Another of
60. to ex-
empt from
being com-
pelled to
serve by the
stat. of la-
bours. 23
E 3. c. 1. W. 2
cap. 38. 13
E 1. no. na.
br. 165.

The last age of males respected by the Law, is seventy yeares, at which time Sheriffs are to forbear to impanel them in Juries, and in case they doe not, such old man may have a writ to the Sheriffe, grounded upon the statute for that purpose, made in the time of K. Ed. 1. commanding such Sheriffe to forbear the impanelling of him ; and he may have an action to recover damages upon that statute : This is called by most a writ of Dotage, a word, perhaps, anciently taken in a good and favourable sense, *Pro dote atatis*, viz. a gift, priviledg, or exemption allowed to age in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of these several ages, let us now see wherein and how age is material, touching them who are to make or to be made

made executors, and what age is required thereabout. Master *Perkins* saith, that one of foure years old may make a will, and consequently executors; and his reason is, because the executors being to account before the Ordinary, it cannot be intended, but that the goods shall be distributed for the good of his soul: He speakes as if he only made an executor by his wil, but did not bequeath any thing, but left all to the executors conscience and discretion, which is not usual, though feasible, as before I have shewed, or said at least. But admit it were so, and no bequest at all contained in the will, yet since at that age an infant hath no discretion to elect a fit person to distribute his goods, money, and other things; no nor to make continuation of an executorship to another, to whom perhaps the infant was executor: I cannot see that his Wil should be of any force: but if he be of the age of 14 years, being the age of discretion in the judgment of law, then I should hold him able to make a will, although yet he be an infant til twenty one years, and can make no gift of land nor goods which shall be of force. And *Ba-
bington* chief Just. to other purpose makes

Devises. f. 97
No good
reason, for
one may
make an ill
account,
specially
having a
childs dire-
ction for his
doings.

Colo Lullin
89. b.

X

like

2 H. 4. 13

40. Ed. 3. 44

17 H. 6. 5

1 H. 6. 40

6.

like distinction betweene an Infant of such tender yeares, and one come to the years of discretion. So also as before we shewed, is it in the case of felony. And that way also sounds that which *Hanck* saies in *Henry* the fourth his time, viz. that an infant of 18 years old may be a disseisor; as implying that his yeares may be so tender, that as *Candish* saith of an infant in *Edward* the third his time, he is not to be intended able to know or discern between good and evil; ma thinks therefore he should be at the least of the age of discretion, viz. 14 years, who should bee able to make a Will, and consequently an Executor. And the custome for an infant of fifteen years old to bequeath by wil hath, as to me it seems, affinity with this opinion, though there the Case was of land in a Borough devisable by custome: and that way reflecteth the Case in the time of King *Henry* the sixth, where it was said, that an infant under fifteen years of age should not wage his law, viz. take an oath to acquit himself of a debt, or excuse his default in an action real. And further reason of this opinion will arise out of the consideration of an infant made an executor.

Now

Now touching an infant made executor, how young so ever he be, the making of him so is not void, but yet the execution of the Will, which is the performance of the office of Executor shall not be committed to him till he come to the age of seventene years, by the law spirituell, and till then (for that he is not able to do the part of an executor,) administration is to bee committed to some other; yet if it be a woman infant who is so made Executrix, in case she be married to a man of seventeen years old or more, now is it as if she were of that age, and her husband shall have the execution of the Will, and if administration were before committed during the minority of the woman, it shall now cease, as is said in *Princes Case*. Yet I doe a little marvel at these opinions, considering that these things are managed in the Spiritual Court, and by that law; and it intermedles not with the husband, in the wives case; now by that Law, and not our Common Law, comes in this limit of seventene years. And I have seen it otherwise reported in and touching the last point.

Co. lib. j. fo.
29 P.

M. 41 & 42
Eliz.

Further touching Infants executors

X 2

and

Co. l. 5. f. 29
But payment
is to bee
made to the
Executor,
and not to
the admini-
strator, M.
15 & 16 El.
in Com. B.
rep. 67. Co.
li. 5. fo. 29.

Co. lib. 6. fo.
671

and under the age of seventeene yeates this is to be noted, viz. that such an one is not able as an executor to assent to a legacie, so as it may by vertue thereof settle in the legatee. Also if administration be during such minority committed with special words of restraint or limitation, viz. that it is done to the use or profit of the infant executor, then no sale of lease, or goods, or assent to legacie by such administrator, will bind or prejudice the infant executor; but otherwise, perhaps, if the administration during the minority be committed generally: and if the testator himselfe, making an infant Executor, doth also appoint another to be his executor during his nonage, expressing it to be only for the benefit and behoof of the infant executor, I doubt whether this temporary executor stand any whit restrained from what pertains to the power of an absolute executor; for there may be perhaps difference between him to whom the owner of the goods commits the government of them, though but for a time, and in special manner; and an administrator so specially made by the Ordinary, another being presently by the will of the owner or testator to have

have the administration, in whom for a time legall defect is found. But now let us passe over this age of, seventeene, and consider of the infant betweene that time of his being admitted to take upon him the executorship, and his accomplishment of his full age of one and twenty. First then, suppose that he doth release a debt due to his testator, whether shal this be good to bind him, and to discharge the debtor as wel as if the executor had been of full age, he now having proved the Will, and being by the Law Spirituall approved an able executor? And this point coming in question in *Russells Case*, H. 16 Eliz. in the late Queens time, consideration was had both of divers good reasons for enabling of this release, as that an executor represents the person of his testator, and in his right and power, doth these acts, and not in his owne, and therefore his infancy, which is a state or condition of his own natural person, shall no more disable him, than it doth the King, a Major, or other Head of a Corporation. Also divers books were found to run that way, as wel in the case of an infant, as of a Femme Covert. But upon great

16 H. 6. Re.

45. 21. E. 4

13. 24

Co. lib. 5.
fol. 27.

upon conference had with the Lord *Anderson*, *Manwood* and other Justices, it was resolved and adjudged that the release of an infant Executor without payment of the debt and duty would not bind or bar him: 1. For that if it should, it would bee a waisting or devasting of the goods of his testator, and so would charge his owne goods. 2. It would be a wrong, which an infant could not do by his release. 3. It was no pursuit nor performance of the office or duty of an executor, but the contrary. And upon this judgment, a writ of error was brought in the Exchequer Chamber, where it was agreed by all, that the release was not effectual nor binding, so as this point now had the resolution of all the Judges of *England*. But it was agreed, that if payment or satisfaction had been made, then the infant executor might have made a good acquittance and discharge, and indeed payment it self if proved, brings discharge enough, except in the case of a single Bill; Note that the principal case adjudged was not a release of any debt or duty by specialty, but of trespassse in conversion of goods found or taken in the testators life time. But *Posito*, that this infant

infant had assented to a legacy, whether will this bind him or not? for in the case of *Russell*, it is said, that all things which an Infant doth according to the office and duty of an Executor, will stand firme; now it is part of his office to pay and execute legacies. Yet since this act amounts to a vastation or wasting of the testators goods, as well as the other, in case there remain not goods sufficient for payment of the debts, and consequently here as well as in the other case, the infants own goods would become liable to his testators debts; I doubt, and incline, that it is not, nor can stand effectual, for except in the other we admit a want of possibility of want of assets or goods, the release could neither hurt the infant himselfe, nor do wrong to any other; and that admitted, this case is of like prejudice; yet if those assets should be void, so also would be his payment of legacies, and how then were he an able Executor, at the age of seventene years, to sue, and to be sued for debts, and legacies, and and if upon suit it cannot be shewed that debts wil take up all, or disable the payment, then haply he may be forced to pay; Quære notwithstanding whether

these acts (though voluntary) stand not good upon *Bene esse* or conditionally, viz. if there be besides goods sufficient &c. or that else the nonaged exec. may have an action of accompt for the mony by him paid to the legatee, and also avoid his assent where that only needful. But doubtless neither the assent of such executor before his age of 17, nor any payment of a debt to him could be good, although such acts to or by another executor, before the proving of the Wil would stand firm and good: for this infant wants not only proving, but also ability to prove his testators Wil, yea, the Wil stands suspended, & the testator as it were intestate, whilst the administration stands in force, so as during that time nothing can be done by any as exec. & therefore there is great difference betweene the cases. What if payment of a legacie be made to an infant, can he make a sufficient acquittance? This I confess is besides the point in hand, yet because it concerns infants, and executors (though not infant executors) it is not amiss here to cast some thoughts, & words upon the point, for that it many times perplexeth both executors, and legatees. First therefore in case the infant be of the years of discretion, viz. 14. I hold it cleare

cleare that any payment to him made will stand good, for that the Law at that age holds him able to govern, and manage his own Lands held in Socage, and consequently to receive the rents thereof, wherefore, whether he who makes such payment have any acquittance or not; if he have proof of the payment, he is well enough acquitted from any second payment, and if without payment he get an acquittance, it will not suffice, the infancy of him who makes the acquittance considered. Besides, if the acquittance be, as most usually they are, but signed only with the name of the maker, and not sealed, it is only an evidence or proof of payment, and no pleadable acquittance, because no deed, so as it nothing differs from proof by witnesses, save that it is not mortal as they. But now if the infant be under the years of discretion, what shall we say to a payment to him specially, if he be but 3. or 4. yeares old, or thereabout? here I think caution is to be used by the Executor generally, and the surest way is, if he feare to keep it in any respects, to pay it into the Court, where it is recoverable, viz. where the Will was proved, yet the case so may be, as that this may

Notes of receipts called acquittances.

Quota

payment may not be at all safe for the executor. As put the case, that he entred into bond or statute to pay all legacies by such a day, to the several legatees, here I think the payment into the Court Spiritual sufficeth not, for that must make the receipt to be, with some charge, which is in some kind an abatement; there I think therefore legally to secure the executor, the payment must be to or in the presence of the guardian, because of noriture, viz. him or her who hath (though not as guardian in respect of lands) the custody or education of the infant: for otherwise to pay it into the hands of such a tender infant separate from any governor or guardian, were to expose it to loss; both for that he is not able to count the summe, and for that he yet not being come to discerning years were like with *Aesops* Cock, to part with pearles or coine for plums and trifles of no value. But in case no bond nor other collaterall penalty lie upon the Executor, or in case the bond or statute be, only to perform the Will generally, which nothing alters the course of payment, which by the Will the Law laies upon executors, then is not the executor put to any such payment
nor

nor need pay without demand, and acquittance, as in case of paiment, upon a single Bill, or of rent seck where no distress can be taken; nor other penalty incurred: yet in that case if demand be, and acquittance ready to be given, let the executor take heed, in case he be bound to performance, that he stand not upon the invalidity of the acquittance in respect of nonage; for as I have said, proof by witnesses may supply a nullity of acquittance, and much more the weaknesse or imbecillity; payment according to the testators appointment, being the matter which acquitteth the payer, and this the executor may have testified under the hands of divers witnesses expressing circumstances, so as all dying. he may continue safely from second payment as well as if an acquittance had, the witnesses whereunto are subject to mortality, as well as the other. But herein Courts of equity doe often interpose helpfully for them who seek not evasion from paiment, but only security in paying. And of infant executors, and by occasion thereof, of infancie in Legators or legatees, thus much.

CHAP. XIX.

Of Legacies.

Although these be not recoverable at and by the Common Law, but most naturally at and by the Law Ecclesiastical, yet by suits in Courts of Equity, as the Chancery and Court of Requests, they are often obtained, and of many things touching them the Common Law taketh notice, and hath manifold occasions so to doe: we will therefore consider thereabout these parts or points, some whereof have been in part before touched upon other occasions.

1. Whether any legacie in certaine & lying in prender, may be taken, or had, without the Executors assent, by the legatee, or him to whom it is bequeathed?
2. When an Executor can, or safely may pay, deliver, or assent to a Legacie?
3. Whether one Executor alone may doe it, and what if the Executor be an infant or woman covert?
4. What shall amount to an assent of the
Execu-

Executor, and what to a disassent or disablement of assent ?

How a Lease or chattel real may be given to one for a time, with remainder to another, how not ?

Where an assent to the first or one part of the bequest, shall imply or amount to an assent for the residue.

Of the manner of assents, and therein of assents conditional.

What manner of interest he in the remainder of a Lease after the death of another hath during the life of that other, and whether he may dispose of it during that time and how ?

Whether this remainder can be defeated by any act of the devisee for life, or by the death of him in remainder first.

By what acts or accidents a legacy may be forfeited or lost, and therein of revocation, death before, &c.

Whether the executors assent shall have relation to the testators death, and shall make good a grant before made by the Legatee.

As for the first, we have before shewed the assent of the executor to be necessary before any legacy can be had, for that debts are first to be paid, & that the exe.

If the executor give it to another, the legatee hath no remedy at the Common Law, per *Pris.* 37 H. 6. 30.

to look to at his peril. But hereto adde a little out of M. *Swinborne* a learned Civilian, who saith, that in case any goods be in the hands or custody of *IS*, and the owner doth bequeath them to him, then may he keep or retaine them against the Will of the Executor, so as there be o-ther sufficient goods in the hands of the Executor for payment of all debts: but though this (as it seems) would it stand in the Ecclesiasticall Law, yet for that no property is transferred to the legatee without the executors assent, therefore doubtlesse the executor may at the Common Law recover the thing with-held, or damages to the value against the legatee detaining it. Another case there is, wherein as the learned Civilian saith, the legatee may take the thing to him bequeathed, lying in prender, viz. Horse, other beast, or peece of Plate, or other like thing known, and in being, and that is where the testator doth exprefly so appoint by his will. But herein doubtlesse the Common law, at and by which debts are recoverable against executors, will oppose the Law Spirituall, for else by such appointment the testator might cause all his goods to be taken by legatees, and that none

none should remaine to pay debts. Yet if there be other goods besides sufficient for payment of debts; then indeed I see not how the Executor can hinder such taking without violating his oath taken for performance of the will. If any say that it is also a breach of oath in the other case, I say, he observeth not that there that clause in the will being against the Law, is void, and consequently there is a nullity upon it, and it is as if no such thing were in the Will, and so the oath extends not to it. And as a chattel shall not be transferred to a stranger without the Executors assent; so if the devisee be to the Executor himselfe, till he elect to take as Legatee, it shall be to him as Executor, as appears by the strain and argument of two cases in *Plowd. Comment.* and more lately in the Kings Bench, the point being divers dayes argued, was at last so resolved by three Judges against one: and the reason of *Cook* at the Barre was very good, for here the Executor sustaines two persons, viz. an Executor, and Legatee, and so all one, as where the bequest is to another, for *Quando duo jura concurrunt in una persona, aequū est ut si essent in diversis.*

As

Welchden
and Elking-
ton. Para-
mour and
Yardley.
Portman &
Simmes case.
Trin. 37. Eli.
Allbutt Cay-
dy so a-
greed.

2

21 B.L.Dy.
367.

Co. li. 3. f. 29.

As for the second point, it may have these two parts : First, when the Executor is able to give such assent to a legacy. And secondly, when he may doe it with safety. As for the first, he is able before *probat* of the Will to assent unto the execution of a legacy, as elsewhere is shewed, and that although he be not of full age of one and twenty yeares : but if he be under seventeen yeares, so as he is not able to take upon him the office of an Executor, and therefore administration is during that time to be committed to some other ; Here his assent is not of force or effectual, as we find in *Princes* case to have been held in the case of *Pigot* and *Gascoine*. As for the second part, till all debts be paid, the Executor may not safely consent to put the Legatee into the Lease or chattel devised, no more than he may pay money bequeathed, if there be not sufficient also to pay all debts. Of these things more is said elsewhere. Yet because the Reader, or he that desires direction in these points will looke for them under this title, I thought not good here to be altogether silent touching them.

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As for the third point, viz. Whether the

the assent of one Executor, where there be many, be sufficient, I see not how to doubt, since any one Executor may give away any goods of the testator, or release any debts due to him; therefore much more assent, which is no more or greater work in effect than an attornment of one lessee upon a grant of a reversion. And if there want to pay debts, he onely who assented shall answer for it of his own goods, and not his companions. But if this Executor be either under the age of seventeen years, or under coverture, viz. a woman married, such is not able to give a good assent to binde the others, no nor themselves, for then thereby the Infant might draw a debt upon himself, and the wife upon her husband, by assenting to or paying of a legacy, there not being sufficient goods to pay all debts. But the husbands assent is sufficient where the wife is Executor; for his acts whom she hath chosen to be her head, may prejudice as well her as himself; yea though she were within age, yet he being of full age, his assent will stand good. But if he or another Executor in his own right be above 17. years of age or under 21, I doubt whether now

Y

his

6 H 7 5. If the bequest be to one of the Execu. he may take it without assent of his companions, yet if a debt, his companion may release it. 48. E. 3. 14. 15. So held where but one of the executors during non-age assented, in the case of Rhetorick and Chapel, H. 9 Jacobi. Rot. 895. in Ba. Reg. C.

his assent will be sufficient, at least except the case be put that there be assets sufficient, which perhaps there may be material, though not in the other. See more hereof after in the title of Women covert, and Infants Executors.

4 See Co. lib. Int. 150. the executor being devisee for life, said, the other should have it after her death, & he entered and took admin. she dying intestate, yet held Assets in him. This M. 19. H. 7. Roa. 318. See li. Int. 321. One gave the third part of his goods to A, with whom the exec. accounted for the amount, & A sued for that sum in debt, but no judgment upon demurrer. Tr. 37. F. in ba. reg. Where bequests to the execu. himselfe.

As to the fourth point, first there may be an assent and election implied, as well as expresse, for if in the devise or bequest the legatee be appointed to do some act as in respect of the legacy, and the Executor doth accept the performance thereof, this amounteth to an assent. So if the devise be to an Executor for the education of some children which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as Executor, as appears by the case of *Paramour and Tardly, Plowd. 543*. So if an horse be bequeathed, and one offering to buy him of the Executor himself, he directeth him to goe and buy the horse of the legatee; or if the Executor himself offer money to the legatee for the horse, this implyeth an assent that it should be the legatee's by the Will, and so was it held in the case between *Low and Carter*, where the devisee of a terme did grant it to the Executor

cutor, and this acceptance of a grant from him was held to imply the executors assent that it should be his to grant. But I see not well how that should be Law, which in the latter part of the *Ld. Dyer* is found, viz. where a term was devised to I S, and he was made executor, and after the death of the testator, entered and occupied the Lands a whole year without proving the will, that this was an election to have it as devisee and not as executor. For first, he had good right to the term as executor before probat, and so might clearly in that right have taken the profits, although it had not been devised or bequeathed to him, and that before any will proved. Secondly, he could not by right have it as legatee without assent of himself or some other as executor. Therefore this general acceptance can determine no election, as elsewhere is held. As for dissent or disablement to assent. As if the executor doe once declare his assent that the legatee shall have his legacy, he may then enter into it or take it, notwithstanding the executors countermand or revocation of his assent after. So on the other side, I think, if he fully & expressly deny that the legacy shall take effect,

Tr. 37. Bliz.
If he by wil
bequeath it
to I S, this is
an election
to have it as
legatee.

he cannot after make a good assent thereunto, for that election once made must stand peremptory, be it refusal to assent, or assent. Yet *quære* of this, for that the refusal to assent may be checked by sentence or decree, in the Spiritual Court or Court of Equity, and so an assent be enforced. But if the power of assenting be legally lost by the meanes aforesaid, viz. disabled, I see not how any legal interest can be transferred by that compelled assent, howsoever decreed.

So if the executor take a new lease, after assent is voted. Tr. 37. El. i. Carters case. 19. El. D. 359.

And what is said of a legacy bequeathed to another, the same may be understood in case where the bequest is to the executor himself, and he makes his election to have it as legatee, or as Executor. But if where an Horse is bequeathed to A, the Executor after the Testators death doth ride the horse or use him in the Coach, or in the Plough; I do not take this to be any such disagreement to the execution of the legacy, as that the Executor cannot after assent to the legatees having thereof; no more (though it be somewhat more) then where a drinking-cup is bequeathed, and the Executor after the testators death doth use it to drink in: nay, if a lease of land be bequeathed to A.

and

and the Executor continueth the depa-
 rturing of the Testators cattel therein,
 yet is not this any disagreement to the
 execution of the legacy: but if this lease-
 land were let out by the testator from
 year to year, & the executor dischargeth
 the tenant, and taketh it into his hands
 at the years end, this I conceive to be a
 dissent to the legacy, and so also per-
 haps may his taking or distraining for a-
 ny rent thereupon due after the testators
 death; yet am I not resolute that the dis-
 sent is so peremptory & unchangeable,
 as the assent, remembring the case in *K.*
Henry the eight his time, where a term
 being granted by a lessee conditionally,
 so as the assent of the lessor could be had
 by such a day, though the lessors assent
 were at one time denied, yet might it be
 yeilded at another, so as it were at any
 time before the day: But yet there it was
 held, that if no time of assent were limi-
 ted, then one expresse denial or refusal
 would be peremptory, so as the refusal
 were expressed to the party to whom the
 assent was to be given; otherwise, if it
 were but in speech to or among stran-
 gers. This and the former case, 19. *Eliz.*
 give the best light to this point that

14 H. 8. 23.

Dy. 359. Af-
 ter choice
 once made
 no varia-
 on.

I remember. Now, for disablement to assent, it was held in the fore-mentioned case of *Law* and *Carter*, that where a term is bequeathed to A, and after the Testators death the Executor takes a new lease of the same land for more years in possession, or to begin presently; now by this was the term left by the Testator surrendered and drowned, so as it could not passe to A by the Executors assent after.

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As to the fifth point, viz. in what manner a lease for yeares or other chattel real may be bequeathed to one for a time, with remainder to another; it hath been heretofore much doubted, when a lease for yeares was bequeathed to one for life, or for so many yeares as he should live, whether the limiting of a remainder thereof after his decease were of any validity in Law or not? and this doubt had this ground; any state for life in the judgment of Law is greater than any term for years: therefore when a term hath by his will given his term, or his house or land, which he so holdeth for years to one for life, or for so many years as he shall live; this testator and devisor hath not in the judgment of the

the Law any estate remaining in him; and therefore it was thought very hard for him to give or limit a remainder to another: But after many arguing and debating, it was in the late Queen's time resolved, that such a remainder was good, and that if the first devisee died before the term expired, that then he to whom the remainder was limited, might enter and enjoy the residue of the term: As for the giving of part of the years to one, and the residue to the other; viz. If the terme being twenty years, the Lessee bequeathed ten thereof to his wife, and the remainder to his daughter; Of this no doubt ever was, but that it was good, for that after the first state limited, there remained a further term, viz. ten years more in the devisor, whereof he had power to dispose; whereas in the other Case, after the terme limited to one for life, there remained but a possibility that this life should not take up the whole term. But now put we the case a third way, viz. that the termor deviseth or bequeatheth the thing in lease to one child in taile, with remainder to another, and dyeth, and the first entreth and dyeth without issue; now

Plow. Com.
520. & 542.

Both Alexander and Ralfe were executor ; but that makes no difference.

whether shall the next in remainder, or the Executor of him so dying, have the term residue? And this case came in question and was adjudged about the middle of King *John* his reigne in the Exchequer: for there Master *Hamond* holding by lease for years from the Crowne, the Mannor of *Akers* in Kent, devised the same by his will to *Alexander Hamond*, his eldest Son, and the heirs males of his body, with remainder to *Ralfe Hamond*, another Son, in like manner, and the like remainder to *Thomas Hamond*, and made the said *Alexander* Executor, who after his fathers decease elected to take as legatee, and after *Ralfe Hamond* dyed leaving issue male, and making his wife executrix; *Alex.* not having issue male, granted the whole term by deed to *B & C*, for the behoof of himself and his wife during their lives, and after to the use of his youngest daughter whom *Sir Robert Lewkenor* married; then *Alexander* dying without issue male, the wife, and Executrix of *Ralfe Hamond* entred claiming the term, and being kept out, sealed a Lease, whereupon an *Eject. firme* was brought and a Jury appearing at the Barre in the Exchequer, found a special verdict

dict in effect *Ut supra*. And in argument of this Case, first the maine question was whether this Case were all one in Law with the former, where a term was devised to one for life, with remainder over; so as by the death of *Alexander Hamond* without issue male, the term should goe to the next in remainder, as in the other Case, by the death of the devisee for life dying within the terme, it should doe. And on the plantiffs part it was urged to be all one, so that by vertue of the bequests *supra*, *Alexander* had an estate to him, and his executors only, so long as there should be heirs males of his body; and he dying without such issue, the term remained to the Executors of *Ralfe*, who had the remainder in like manner, & left issue male which stil lived, and so that state of *Ralfe* yet had continuance. For it was admitted by the counsel on that side, that the term could not goe to the issue male of *Ralfe*, according to the words and intent of the will, since it was impossible to make a term to descend without an act of Parliament. This therefore they said the Law should work, which was nearest to the intent, viz. that after *Alexanders* death it should
goe

goe first to his Executors, and assignes, so long as issue male of his body doth continue, and for want of such issue, then to *Ralfe* his Executors and assignes; so long as his issue male should last; and therefore in this case the issue male of *Alexander* failing, the Executor of *Ralfe*, whose issue male faileth not, should enjoy the terme, and so judgment ought to be given for the plantiffe, being Lessee of that Executor: on the other side it was said by the defendants Counsel, that this case differeth much from the other case, where the term or Land held by Lease, is given but for life to the first with remainder to another; which case, as having been often resolved, was clearly admitted to be good Law; for in that case the intent of the Testator might, and did take effect. But in this case, if the Land should goe to the Executors and assignes of *Ralfe Hammon*, it must goe against the intent of the Testator, whose minde and will was, as it appears by his word, that it should goe only to the issue male of one Son after another, and not to any Executors. Now then, since this intent was so contrary to the rules of Law, that it could not take effect, there-

therefore it must be void, and so all the words of heires Male standing void, the Will is to be construed as a sole, and absolute gift, and bequest to the said *Alex.* and consequently the terme must goe to his Executors, and assignes. And for this point resemblance was made to a Case resolved in the Kings Bench, where a Lease was made by indenture to *A Habend.* to A B, and C for their lives: now because B and C could take nothing, it was resolved that A should not have it for their lives, but for his owne only. This Case was said to come very close in reason to the Case in question; for as here the intent of the Lease was that B and C should be estated for their lives, and since that could not be, therefore the naming of them should be utterly void, and as if they had not at all been named; and their lives shall not stand as a measure for the estate of A. So in the other Case the intent of the Will, being that the Lease, or Land Leased should goe to the heirs Males of the body, first, of *Alexander*, and after of *Ralph*; since this cannot be, therefore the words, and name of heirs males should stand for a meere blanck and cypher, and not to

Windmore
and *Holford*
vel *Holbord*
in 28. & 29.
Eli. argued;
and Tr. 29.
El. adjudg.

mea-

measure out any state to the said *Alex. & Ralf*, and their Executors and assignes. Also it was said on the defendants part, that an estate for life in the judgment of Law is of so short, and uncertaine continuance, that if A make a Lease to B for his life, and after makes a Lease of the same Land to C for years, now shall not this latter Lease be void absolutely, for any part of the term, but shall stand in expectance of the death of B, and as soon as he dyeth, shall take effect immediately: whereas if the Lease to B had beene for ten yeares, or any like term, then the Lease to C should have been void for so many yeares of his term: thus it appears that a state for life is very momentary in the judgment of Law, and not reputed of any certain continuance so much as for a day. But it is otherwise of an estate taile, so as if A having given Land to B in taile, doth after (without indenture, which makes an Estoppel) make a Lease to C for 21. yeares, and then B dyeth without issue during the term, yet shall not the Lease take effect, because it was utterly void at the first making. For an estate taile being a state of inheritance, may in the intendment

ment, and iudgment of Law have continuance for ever, as appeares both by the Case of *Adams* and *Lambert*, where it is held within the Statute of Chanteries, which speakes of gifts to have continuance for ever. Therefore a reversion upon an estate tayle is no asssets, nor giveth cause of receipt, otherwise in all these Cases it is touching a reversion expectant upon a state for life. Againe it was said by the defendants councel that an estate may be limited to A and his heires during the life of B, with remainder to C, as in *Chudlies* Case was resolved: but if Land be given to A and his heirs, so long as B shall have heirs of his body or heirs males with remainder over to C, this remainder is utterly void. So as there is in the judgment of Law a great difference between the largenesse and continuance of an estate tayle, and of an estate for life. And if (which is worth the observing) a fee simple cannot afford a remainder to be drawn out of it after such a gift to one and his heirs, during the continuance of an estate tayle, or of the measure thereof; much lesse can a term yeild such large thongs to be cut out of it, as a remainder after an estate

28.H.8. Dy.
fo.7.

estate to one so long as he shall have heirs of his body, or heires Males, which is all one. And in this case the remainder was held void by *Baldwin* and *Shelly*, though *Englefield* were of contrary opinion, as the Lord *Dyer* sheweth. Further it was said, that if such a conveyance by will should stand good, it would raise a perpetuity not to be cut off by any recovery.

But whereas the case of *Hammon* hath been related before, (so by way of admittance it was argued as a gift, and bequest to *Alex. Hammon*, and the heirs males of his body, with remainder in like manner to *Ralph*.) The truth of the case was, that the words of the Will, were only to *Alexander*, and his heirs Males (not speaking of his body) and so to *Ralph*; which, as was urged by the defendants counsel, made the Case stronger against the plantiffes: for admit that the former way, *Alexander* should have had but a state determinable upon the continuance of his issue Males, yet here not so. Since the reason why in wils, such a devise being made, the Law should supply the words (of the body) is onely to make an estate tayle to the issues Male

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according to the Testators intent. Now in this case of a term for years so bequeathed, no estate tayle could possibly be, though these words had been in the will; and therefore the motive to the Law sayling, no such supply will be made by the Law, since it would be to no purpose: consequently, here was neither state tail, nor issues or heirs Males of the body, on whose continuance this state of *Alexander* should be determinable. Therefore it was an absolute, and total bequest of the term to *Alexander* for ever, viz. so long as the terme should continue: for as a bequest to one for ever is as much as a bequest to him, and his heirs, so a bequest to one and his heirs, is as much as if it had been to him for ever.

And this Case after six arguments on each side at the Barre (if I much mistake not) was upon argument by the Barons adjudged for the defendant, by the Lord chief Baron *Tanfeild*, and Mr. Baron *Bremley*, Mr. Baron *Denham*, (who only heard, as I take it, one argument on each side, made of purpose in respect of his coming into his place after the former arguments) being of
the

the contrary opinion : and the judgment proceeded upon the point formerly touched, that as this case was, the state of *Alexander* did not end by his death, and remaine to the Executors of *Ralph*. Other points were stirred which will be touched upon in other divisions after in this Chapter. It will be observed that I doe more fully expresse reasons, and points inforced on the defendants part, then on the plaintiffs, wherefore let these two reasons be accepted. First, that I better could relate that then the other, being the first who argued for the defendant, and hearing little of that which was by others sayd on either side after, nor hearing the Courts, *Nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lye on the defendants part, to prove that this Case differed from the common case of devise to one for life, with remainder to another.

6 We are now come to the sixth point, viz. That where House, or Land held by Lease, or the profits thereof, or the Lease or term it self, which in a Will makes no difference, is bequeathed to A for life, or for some part of the term with the remainder to B, and the Executor assigned

senteth that A shall enjoy his bequest, whether this shall enure to B also, since without the Executors assent, no legacy can take effect. And it hath been resolved that this assent shall be effectual, as well to all the remainders as to the first estate, and so according to former resolutions, it was admitted in *Hamonds Case*, that *Alexander* his assent to take as legatee sufficed (if the bequest had been good) for the remainders to *Ralph*, and others. And the reason of this doubtlesse is, because here the particular estate, and the remainder are all but one estate in Law; they make but one degree in a Writ of Entry, nor shall have but one year & a day to enter for mortmaine; And an attournement to the grantee of a rent or reversion for life with remainder over doth enure also to the remainder, which being assent hath much affinity to that of the Executor, each tending to perfect the grant of another man. Now then whereas it was urged in *Hamonds Case*, that the state limited to *Ralf*, should take effect not as a remainder, but as a new estate to commence futurely, viz. when *Alex.* should be dead without issue male: if it should be admitted to be so, then could

Plow. 345.6
Co. lib. 10. f.
47.

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not

not the assent of the first state to *Alexander* have enured to this, since to R in remainder it worketh as being one estate with the first, which reason must faile the other way. This difference between a remainder, and new estate future, brings to my minde the case of a rent by way of new Creation granted by C, out of Land to A for life, or in taylor, with remainder to B. In like manner it hath probably been held, although this limitation to B cannot be good by way of remainder, because C had no estate in the rent remaining with him when he made the grant to A, yet should it be good by way of new grant, and creation to commence futurely. But this doubtlesse cannot so be but with a difference, for if the grant were by indenture between C on the one part, and A only on the other part, now B being no party to the deed can take nothing by it except by way of remainder; but if he were party to the indenture, or if the grant were by deed poll to which all men are a like parties, then it happily may enure as a future grant to B. This is not impertinent.

Now as the Executors assent to one cannot enure to another, though of the
same

same thing, except by way of remainder; so neither can it any way where the things are not the same, except in very special cases; as if a termor bequeath a rent to A, and the Land it selfe to B, the executors assent that A should have the rent, is no assent that B should have the land; yet I thinke the assent that B should have the land, doth imply the assent that A should have the rent. 1. For that the restraint imposed by the Law, against the passing of a chattel by a will without the Executors assent, being out of respect to the payment of the Testators debts: now if the Land shall passe to B, it is no more available to the Testators debts that it passe discharged of the rent, then charged. 2. Since the gift and bequest was of the Land charged with the rent, therefore if this bequest shall take effect, it shall carry the Land according to the Testators intent, viz. with this charge upon it: for what else doth the Executor in this, but assent that the will of the Testator herein doth stand and take effect, and consequently B must take the term according to the will, and not in any different or contrary manner.

Plow. Com.
521. In Brez.
& Rigdens
case. So of
common or
other profits

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Next we are to consider of the manner of assents by executors, which hath some affinity with the fourth point. But here we shall consider only of assents conditional. Now to this purpose we wil cast our eyes upon two sorts of conditions, viz. precedent and subsequent. As for the former, an Executor may to a legatee absolutely give assent upon a condition precedent, as thus. I am content, that if you can get and bring in to me such a bond wherein the testator stood bound unto I S, that then you enter upon the term, or take the corne or cattel to you bequeathed. So of other like conditions which may precede the assent, as if you can get the assent of my Executor, or if you will pay the arrerages of rent to the lessor behind at the testators death, or if you wil pay the wages already due to the servants attending about the cattel or corn to you bequeathed. In this case, if the condition be not performed, there is no assent, & therefore the conditioning in this manner is good. But if it be on a condition subsequent, as thus, I do agree, that you shall have the thing bequeathed to you, provided that you shall pay so much yearly to me, or to such a creditor of the testator;

tor; now the legatee entring into or taking the thing bequeathed, shall not lose it again by failing to performe the condition afterwards, for the executor by his assent cannot make that legacy conditional which the testator gave absolutely, no more then he can make the bequest to be absolute which the testator gave conditionally, except by a release made of the condition. As in other things, so in this the executors assent is like to the attornment of a lessee, which cannot be upon a condition subsequent, where the grant is absolute or without condition, though yet he may to his attornment prefix a condition precedent.

In the eighth place we are touching the bequest of leases or chattels real, to consider what manner of interest one to whom a remainder of a term after the death of another is limited, hath, & whether he may grant the same or dispose thereof during the life of the first. And as to that it is cleare that he hath but a possibility of remainder, for that possibly the whole term may be spent in the life of the first, to whom during his or her life it is bequeathed, now a meere possibility is not grantable. Therefore was

22 Eli. Fol.
163 case.

Lampets
case. Co. li.
10. fo. 48.

it resolved in the late Queenes time, where he in remainder granted or sold his state or interest to another during the time of the first, that this grant was utterly void, because a possibility cannot be granted; but whereas some opinion in that case was delivered that this possibility could not be released, no more then granted, it hath since been resolved that he in the remainder by his deed of grant or release of the devisee for life, may make his estate, which before was determinable by his death, to be now absolute, so as it shall continue to his executors, administrators, and assignes after his death during the whole term. It may be that what was conceived in the said case of *Pulsey*, negatively of the validity of a release by him in the remainder, might be meant or perhaps expressed of a release to him in the reversion; but surely (me thinks) though he could not surrender, yet his release or defeasance to him in reversion or remainder having the freehold or inheritance, should dissolve or destroy this term residue after the death of the devisee for life, so as there the freehold should be discharged thereof. But *Qua-*

re,

re, for I have not known this in question. As for the other point of *Fulses* case, it was in the said latter case of *Lampet* confirmed and admitted for good Law, viz. that this possibility of remainder could not be aliened nor conveyed to a stranger.

Now we are come to the ninth Point, 9. Point. viz. to examine whether any act of the devisee for life can frustrate or defeat him in the remainder of the term, and whether by the act of God, viz. the death of him in the remainder before the first devisee for life, shall defeat it. As to the first, it hath divers times been resolved, that no grant made by the first man, can cut off or defeat the second, though formerly it were held otherwise; but according to the late resolution was it also held or admitted by all in the said case of *Hamond*, where was such a grant. And as this cannot be done by direct grant or alienation, no more can it by an indirect, or implied, as by taking of a new lease, which is a surrender in Law of the old lease, no more than by an expresse surrender. Nor doubtlesse by outlawry, whereby the term of the first devisee is settled in the Crown. But

plowd. 520.
Welcden &
Elkington,
10 Eliz. D.
277. 19. Eli.
D. 359. Cor.
8. Bl. D. 253.
& 33. H. 8.
Br. chatch.
23.

welchden &
Elk. ubi su-
pra. But
there the
point was
never que-
stioned,
though such
death was
there.

if we put the case further, of wast com-
mitted by the tenant for life, or breach
of condition by not payment of the rent,
or otherwise; these for the whole in the
latter case, and for the part wasted in the
former, doe so destroy the lease, and
put the reversion in *Statu quo prius*, as
that all remainders must needs faile: so
of a feoffement or other like forfeiture
by fine. As for the death of him in re-
mainder, it was urged in the case of *Ha-*
mond, that since it was but a meere pos-
sibility, if it could not take effect, and
become an estate in the life of him to
whom it was limited, it could not settle
in his Executor; and to that pur-
pose were cited the case of the Rector
of *Chadington*, and more expressly as re-
solved in the point, the case of *Price* and
Atmore. But the Court resolved (and
found former resolutions in other Courts
that way) that the death of him in re-
mainder did not hinder, but that it may
settle as well in his executors upon the
death of the devisee, as it should have
done in himself, if he had overlived the
first devisee for life. If the lessor enter
and levie a fine, and the devisee for life
enters not, nor claimes in five years, he in
the

the remainder may enter, as having a right futurely accrued.

In the last place we intermedled only *10. Point.* with leases bequeathed, wherein yet is to be understood, that what thereof is spoken, is to be extended to, and understood of all other chattels real, as wardship of body & lands, estates by extent upon statutes or judgments, terms otherwise than by lease, in fairs, markets, rents, annuities, commons, advowsons, and other profits; yea, one single next avoidance of a church. Now we come to consider of bequests personal, principally, if not only, viz. how such may be forfeited, lost, or revoked. First then, we will consider of the acts of the legatee; secondly, of the acts of God; thirdly, of the acts of the testator. The legatee, as from the Civilians I learne, may forfeit his legacy by his mis-carriage towards the Will: as if he use meanes to have it concealed and kept from being known, and consequently proved. So if he accuse it of falsitie. So againe, if he deface or destroy the Will. Also if being by the Will appointed to be tutor or educator of a child, he refuseth so to be; so saith Master Swinborne: but *Silvester Prierius* seemes

Of forfei-
ture, revoca-
tion and o-
ther loss of
legacie.

Swinb. de te.
tam. 352,
353. Except
as tutor or
guardian he
accuse it.

Sum. Silv.
284.

De Testam.
252.

De Testam.
255.

seems to me opposite in that where he saith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non est conditionale, sed modale*; so as he takes away the force of a condition from words conditional, whereas the other without words conditional raiseth a condition implied. Lastly, if the legatee presume too farre upon the strength of the bequest to him, so as he taketh the thing bequeathed without the consent of the Executor; thus also doth he forfeit his legacie, saith Master *Swinborne*, unlesse the Testator did will and appoint he should so doe. The falling into enmity with the Testator, will be considered of more firly, as I take it, among the acts of the Testator. In the next place let us see what acts of God shall cause a legacy not to take effect; first thus, If the legatee dye before the Testator, this legacy is lost, and his Executor shall not have it: So also saith Master *Swinborne*, if it be appointed to be paid after the death of the Executor, and the Legatee dyeth before the Executor, it is lost; and so also if he dye before the condition performed, saith he; Let us come now to time of payment, and death before

before it. If there be a day certaine limited for payment, and the Legatee dye before that day, his Executor shall have the Legacy; contrariwise, if the payment were limited to be made when the Legatee should be married: but if it were only exprest to be towards the marriage of the Legatee, and she dye before marriage, her Executor shall have it, saith Swinborne. Now put the case that a legacy is bequeathed to B, to be paid when he shall be five and twenty years old, and B dyeth before that age, it shall now be payd to the Executor, and that presently without staying till B should have been of that age, saith *Pri-er*. Nay, saith *Swinborne*, if the words of the Will be so, viz. when he shall come to such an age, then if he dye before, his executors shall not have it at all: but if the bequest be general, and further it is added in the Will, that the Testator would have that legacy paid the Legatee at such an age there, though he dye before such age, yet his executors shall have the summe bequeathed. The difference may seem very nice, yet happily it wants not some probable colour of reason. Now lastly let us come

Vide Bro. Devise 27. & 45. there were divers daies of payment, & the devisee died before the last; his executor shall have it 14. vel. 24. H. 8. 36. H. 8. & 3. El. Dy. 19. See this difference.

in Bond
p. 1 p. 278

Sum. Silv. 283. According hereto; vide Dy. ubi supra, per majorem opinionem Justiciarum.

Acts of the Testator.

Sum. Silv.
285.

to the testators own act, who clearely hath power to revoke or countermand any legacy, though he revoke not the rest of the Will; and here first of revocation presumed. If there fall out *Graves inimicitia inter legantem & legatarium, legatum caducum efficitur*, saith the Summist; *Sed non propter leves*, saith he, *et si graves, si tamen redeant ad amicitiam, reintegratur legatum*; that is by grievous enmity after arising, and never reconciled between the testator and legatee, the legacy is dissolved; otherwise of a light breach, or falling out, though it continue until the death of the testator. This I conceive to be rather fit for this place, as an act of the testator, than to be reckoned or registred amongst the acts or forfeitures of the legatee, for that it is not by the Summist made material, or any point of difference, whether the legatee gave just cause of offence, or that the testator unjustly conceived displeasure, and so grew into causelesse enmity. Therefore also doe I hold it of the nature of a revocation implied or presumed, for that although no revocation be made, yet since the testator hath ceased to beare good will to the legatee, he cannot be intended to will him good,
nor

nor consequently to be of the same mind, touching the benefitting of him, as he was when he made his Will: yet here again it is worth the consideration, whether the circumstance following may not make a difference in the case thus, That where the testator dyeth shortly after the breach and enmity grown, and before he come to the place where his Will is, or at least to opportunity of perusing and reforming the same: There this very alteration of affection should make an alteration in the Will, and a revocation of the amicable bequest. But where he living a good space after, and coming to the place where his Will was, and specially if he doe againe peruse it, and yet doth not crosse nor expunge that bequest, here it may be presumed that either his enmity ceased, or that so farre as to continue this bequest, the charity or other motives inducing him to make it, stood unvanish'd and not extinguish'd by this breach of former amity. For as the continuance of time and opportunity after the making of a verbal or uncupative Will, without reducing it to writing, and causing it to be attested by witnesses, though the Testator live divers yeares after,

after, doth strongly argue his intent not to continue, that what was done in an extremity should stand as his will: so on the contrary, the permitting of a bequest expressed in a written Will, to continue without any crossing, blotting, or defacing, may argue against contrary presumption, the Testators minde, that it should continue as part of his Will. But now let us consider of more expresse revocation, and to that purpose will I relate a late decree in the Chancery, made by the Lord Keeper, according to the opinion of the Master of the Rolls, three Judges, and two Doctors, Masters of the Court; Between *Robert Eyre* and *William Eyre* complainants, and *Hester* late wife of *Christopher Eyre* their brother, and now wife of *Sir Francis Worley*, Defendant; Thus was the case; The said *Christopher Eyre*, 15. *Jacobi*, by his last Will and Testament giveth and bequeatheth to the said *Robert Eyre*, his brother, an hundred pounds, and to the said *William*, his brother, a thousand pounds, and gives to the said *Hester* his wife all the residue of his estate, and makes and ordaines the said *Hester* his sole and only executrix, saving for the per-

performance of his Will, ordaines *Robert Eyre* and *William Eyre*, his said brothers, whom he intreats to joyne as Executors in trust with his wife, for the better performance of this his last Will. Afterwards, Jan. 5. 1624. being sick of the sicknesse whereof he dyed, he was moved by Master *Damport*, and Master *Stone*, to settle his estate; to which motion he yeilded, and Master *Stone*, and Master *Damport* did demand of the said *Christopher*, what friend he thought fittest to be his Executor, and to whom he would commit the care of discharging his funerals, and performing his Will, whether he trusted any person more than his wife, to be his Executor? To whom he answered, That his wife was the fittest person for that purpose, and therefore should be his sole executrix: and then the Testator was moved by Mr. *Stone* to give and bequeath legacies to his father, to his brethren, and to his kindred; whereupon he answered he would give or leave them nothing: and being further put in minde to remember his friends and others, gave and bequeathed to *Lionel Atwood*, his God-child, twenty or thirty shillings; and being there-

thereupon moved by his wife to give his said God-son more, or a greater legacy, or the like in effect; said, thou knowest not what thou doest, doe not wrong thy selfe, twenty shillings, or thirty shillings is money in a poore bodys purse, or the like in effect; and the rest, he left them to his wives discretion or disposition, and the said Testator did speake the words aforesaid, or the like in effect, *Animo testandi & ultimam voluntatem declarandi*, as the witnesses then present did conceive.

Ord. 17. Jun.
a. 2. Caroli
regis.

This Will was proved by the oath of the said *Hester*, and this *Codicell* being pleaded as a revocation of the said bequests: The said Master of the Rolls, Judges, and Doctors were by the Lord Keeper, and the Order of the Court desired to reduce the matter upon the Will and *Codicell* into a case, and to certifie their opinions, whether the said *Codicell* were a revocation of the legacies given to the plantiffes or not. And they, after counsel heard at several times, viz. both common Lawyers, and Civilians, and many hours spent in conference together, did finally resolve with one unanimous consent, that the legacies to the plantiffes given

given were not by the said *Codicell* revoked, and so certified under their hands, upon reading whereof *Novemb. 25.* decree being resolved to be made, if cause were not shewen to the contrary, *Novemb. 27.* on which day the defendants Councel before the Lord Keeper in the presence of the Master of the Rolls, and the said three Judges, and Sir *John Heyward*, alledging what they could in stay of the said decree: It was by a general concurrence of opinion decreed, that the legacies given to the said plaintiffs, should be to them paid on our Lady Even, with twenty Nobles in the hundred for the detayment thereof.

This case I thought fit to relate somewhat at large, because it pitcheth upon the point of revocation without plaine, full, and expresse terms. And surely as Wils are to be made out of disposing memories, and understandings, so also with deliberate, & advised judgments; & therefore by like reason not to be countermanded, or revoked by sick, or sleight expressions. And this seems to me very agreeable with the rule, and reason of the comon law. For as reason it self doth dictate; that *Nihil tam consentaneū est aquir*

A a

tati

tati naturali, quam unumquodque dissolvi eodem modo quo conficitur; So hath the common Law of England, in my understanding, resolved; as for the purpose, if the King present a Clerke to a Church, and he is thereupon admitted, and instituted thereunto. Now yet before induction may this be revoked as a Will may. Yet if the King shall after, and before induction present another man to this Church without an expresse repeale or countermand of the former presentation, it shall not hereby be revoked. So if Lands were conveyed to certaine uses, with a clause or power of revocation; the sale of the same to another did not revoke the former. But if a state were meerely at will, then the conveyance to another by the common Law, amounted to a revocation. Therefore was the Statute made *tempore Henrici 8.* to redresse this, viz. that where the King had granted lands, or other things to one during his pleasure, this should not be revoked by a grant to another without recital of the former, and declaration that the King had determined his pleasure.

To help this
was the Stat.
made 27. El.
cap. 4.

6 H. 8. ca. 9.

11. Points.

Being now to consider of relation in
the

the Executors assent, it is meet that since these discourses are principally intended, for those who are not grounded Students in, or professors of the Law, that we shew what we meane by relation, or what it is in Law. Thus therefore be it conceived; that relation is a kind of fiction in Law, making a thing done at one time to be accepted, and repuld, or to have its operation, as if it had been done at another time past. As for the purpose, A doth bargain, and sell freehold lands to B, in *August* by indenture, which is not inrolled till *October* following, yet this hath such relation to the date of the indenture, that if A after that, and before the inrolment, become bound in a Statute, or granted a rent charge, or made a Lease for years, or tooke a wife, or committed felony, yet shall none of these be of any force to charge or prejudice the state of B, for that the Law adjudgeth him now owner by relation as from the time of the date: yea, if a servant departing in *August*, for some great breach with his Master, doe kill his Master in *October*, this is in Law petty treason, as if he had continued servant when he did the fact, because

it relates to the malice conceived when he was his servant. Now then having shewed that a term or other chattel real or personal, passeth not, nor is transferred in property to the devisee until the assent of the executor be thereunto had; we now put the case that this assent is not had till a year, or some such good space after the testators death, & make our question whether this shall have relation to the testators death, viz. to be in the laws account as if it had then been. Or perhaps to some purposes so to stand, and to others not so. That this is useful, and material to be known, be it thus shewed: One bequeatheth his term of tithes of an advowson of an house or land by him first leased, to an under tenant for rent, and dyeth in *May*, the executor assenteth to the bequest in *October*, between which two times tithes be set out, the Church becometh void, rent groweth payable; now if this assent shall relate to the testators death, the devisee shall have these, else not; the like cases may be put of the brood of Cowes, Mares, and Ewes, fallen betwene the death of the testator, and the assent; so also of fleeces of sheep shorne, &c.

Now

Now to come to the point, it is reported by the Lord *Cooke*, to have been held in the late *Queenes* time, that this assent shall, as betweene the Executor, and the legatee, have relation to the testators death; yet so that if the Executor before his assent to the devisee of a lease, committed wast, now the action of wast shall be brought against the Executor, in the *Tenuit* for the wast done before, and not against the devisee in the *Tenement*.

Tr. 41. Eliz.
Co. li. 5. f. 12.
B. Sanders
case. Vide
Plow. c6 of
an action of
trespasse a-
gainst a
stranger for
taking be-
fore assent.
280. b.

But put the case that the legatee, before the Executors assent, granted the terme to I S, now if to any purpose this assent shall have relation, it shall certainly so be to make good this grant, as making the legatee to be estated, and consequently able to grant before the executors assent; yet do I not finde any opinion or resolution in the Point, but finde it debated at the Bar in the late *Queenes* time, between *Puckering* and *Egerton*, in the case of administration granted to A after her grant of a free term, left by her intestate husband; but I finde no resolution therein, nor perhaps wants there material difference betwixt that case, and the other.

P. 25. Eliz.

A a 3

for

48 E.3.15.

for there the devisee had at least an inception of title by gift of the owner, wanting only a circumstance of assent to perfect it: but here this woman till administration had not so; unlesse perhaps the Statute 21. of K. *Henry* the eighth, directing or enjoining Ordinaries to grant administration, shall amount to a kind of title *ad rem*, though not yet *in re*. But to returne to the Point of assents; where a reversion is granted by deed or fine, if the lessee a good time after doe attorne, this shall have no relation to the time of the grant; So as for wast committed or rent grown due between the grant and attornment, the grantee can have no remedie. Therefore it is good for him who buyeth, or hath any thing of the gift of a legatee, to have the assent of the Executor, before the sale or gift, well testified; or if the assent be not had till after, let him take a new gift, that he may not rest in a doubtful case, for besides the premises, that great legist, Sir *Edward Cooke*, when he was a practiser (to Master *Stubbes* of *Norfolke*, for his fee) gave his opinion, as I have been confidently informed, that where a lessee for yeares, being outlawed

lawed, did grant his terme, and after reversed the outlawry, this did not make good the grant by relation, it not being in the grantor at the time of his grant: and this hath much affinity with the principal point, for there if the relation help not, the grant is not good from the legatee.

Divers cases of bequests, considered, and expounded.

IF a termor of an House, bequeath his House to B, without expressing how long he should have it, he shall have the whole terme, and number of years. So of Land. 14 Eliz. Dy.
307. cont.
in a grant.
31 Eliz.

Also by the name of the House, the Orchards, Gardens, and Backsides doe passe: yea if the House with the appurtenances be bequeathed, thereby the lands belonging to the House, or used with it, doe passe, though yet they would not so doe, by such words in any lease, deed, or grant; yet by some Civilians or Canonists, the Orchard belonging to an House shall not passe by the onely gift of the House, without some words, shewing the intent of the Testator so to

*Sum. Sily.
286.*

A a 4

be;

be; or except one gate or door lead as well to the orchard, as to the house; but some other of them hold that it doth passe without any such help of circumstance, so as it be adjoyning to the house.

If a lessee for years give his term by his will to A, he shall have it without paying any rent, for the executors shall pay it for him, as I finde in the Summist, but against reason me thinks.

Ibid. ut sup.

If one bequeath his indenture of lease, his whole state in that lease passeth. So if one bequeath his obligation or other specialty; the debt or duty it selfe shall goe to the legatee; and by the Canon or Civil Law the very action it selfe passeth, viz. as I conceive, ability to sue the debtor in his owne name; but in our Law it is otherwise, the suit must be in the executors name, for a debt or thing in action cannot be assigned except by or to the King; and only at the common Law is the debt recoverable; but the Spiritual Court may force the executor to sue or let his name be used in the suit for and by the legatee.

Yet 48. E. 3.
12. 15. It is
admir. that
such a devise
of all
goods after
debt paid,
shall have
a duty re-
siding in ac-
count.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corne, nor fruit growing on the ground,

ground, nor stone, nor timber prepared for building, as the Canonists and Civilians hold.

On the other side, if one bequeath the moiety of all his goods, the legatee shall have only the moiety of that which remains after debts payed, for that only is to be accounted the testators which he hath *ultra as alienum*.

By a bequest of all utensils or householdstuffs, plate nor jewels are not given.

Quæ. 36. H. 8.
Dy. 59. Dy.
Ibid. supra
Sum. Silv.
286.

If one bequeath to his wife all her apparel, she shall not have, as some Civilians say, her ornaments of gold or silver, by which is meant as I take it, chaines, jewels, bracelets, rings, &c. but others are of contrary opinion, except they be such things as are not lawful for her to weare.

Ibid.

If a Bed be given by a will, *Venit ornamentum ejus*, saith the Civilian; that is, the furniture thereof passeth, viz. not only the bed, bedstead, bedcloaths, but also the Curtaines and Valens, as I take it. But I think that by gift of a Coach by will, the Coach horses passe not; yet perhaps the furniture of the Coach-horses may passe as appurtenant to the Coach; for so I think they shall doe, rather then by bequest of the Coach horses without the Coach.

If

Ibid.

If one bequeath to A meat, drinke, and cloathing, or *alimenta*, he shall have, saith the Civil Law, also lodging, habitation, and all things necessary for the maintenance of life, viz. as I take it, fire and washing, &c.

Ibid.b

If one bequeath to his daughter tenne pounds a yeare for her apparelling, and she demandeth none in foure years, now shall she not after that time have the ar-rerages of this ten pounds by yeare for the time passed.

Ibid.

If a man bequeath one of his horses or cowes, not naming which, to I S, he is to chuse which he will, so it be not the best of all, saith the Civil Law, and perhaps the mention of that exception growes out of respect to the hariot, which the Lord should have, or the mortuary which the Parson should have.

Ibid.

A man bequeathed thirty pieces of twenty shillings to A, twenty to B, and ten to C, to be had in such a Chest or Casket, and it is found after his death, that there be but thirty in all in that casket or box, now each shall be abated ratably, saith my Summist, so as A shall have fifteene, B ten, and C five; and this stands with good reason and justice, for
so

so each hath a proportionable part. And it were reasonable, that it were by Parliament established for Law, that all both legatees and creditors should be paid in like proportion, where the state will not suffice for full payment of each, rather then that an Executor should have power to pay one all, and another nothing: yet if the testator left sufficient to make good all those sixty pieces bequeathed, *Quare*, If that which is wanting in the casket shall not be supplied and made up, for if the cases following four d with the same Author be good Law, it should seem so to be.

If one, saith he, bequeatheth to I S, Sum. Silv. 186. that which is another mans, and where- to the Testator hath no right, then ought his Executor to buy it, and give it to the legatee, or else satisfie him to the full value, and this not only by the Civill, but also by the Cannon Law, and in *infero conscientia*, saith my author.

Againe, if A bequeath to B, such an Ibid. 187. horse by name, and after sell away that horse, and dyeth, now is his Executor bound to answer the value thereof to B; and if the testator after his sale of that horse had bought another, and called him

him by the same name as the first, now shall this latter horse passe to B, saith the booke, except it can be proved that the testator sold the former horse of purpose to revoke his will touching that bequest.

Ibid. 286.

So againe find I, that if one having but a moiety or one halfe of Green close, or of a stack of corn, or other chattel, doth give the whole, so as the words be apparent to reach to more then his moiety, then must the execut. buy out the others part for the legatee, or give him the value; but if the words be but general, so as they may be reasonably satisfied with the testators part, no supply shall be made, So also if one having goods in pledge, bequeath them, it shall be construed to extend no further than his right.

Ibid. 284.2.

A bequest is made of an hundred pound to be paid at a future time, viz. divers years after the testators death; a question is made by the Summist, whether the profit of the money in the meane time, shall goe to the legatee or the executor, and he resolves with this difference, if the day were given in favour of the legatee being an infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite of pay-
ment

ment were in favour of the executor, then shall the legatee have but the bare sum without any addition of meane profits.

If one bequeath all his term or goods to his executor for payment of his debts, or debts and legacies, it is a void bequest, because it is no more than the Law would say, if he had said nothing. So if it be generally to performe his will.

If one seized in fee-simple of land, bequeath it to his executor to pay debts, the executor hath no state of free-hold; for if he should, then it must be either for life, which might end by his quick death before debts payed: or in fee-simple, which would carry away the land for ever from the heire, where perhaps a few yeares profits might suffice to satisfie the debts; yea, then by the death of the executor the land should descend to his heire, and not goe to his executor, who would be executor of the first testator.

If one give or grant all his goods, having leases for years as well as moveables, the leases shall not passe, as was held in the time of King *Edward the sixth*. And so also was it admitted in *Portmans case*, for the word *Bona* comprehendeth only moveables by the better opinion there.

But

By deed or word in life.
4 E 6. Bro.
Done, &c.
43. Tr. 37.
El. in ba.
reg. Portman. ver.
Simmes or
Willis, divers times
argued.

But the point in that case was pertinent to this place, viz. a bequest in a Will of all the Testators goods, and whether thereby a lease for yeares passeth or not, was divers times debated, but not resolved, the Judges differing in opinion in that point; but in another point which made an end of the case, all agreed. Yet the better opinion was, as I find in my report, that a lease would passe by such words in a Will, though not in a deed or grant by word otherwise made, for the legacies are demandable in the Spiritual Court, where *Bona & catalla* are taken for all one. See also the stat. of *Marlbr.* giving an action to the successor, *Ad repetenda bona predecess.* Yet an *eject. custod.* hath been maintained thereupon: so also upon the statute for Executors, *de bonis asportatis in vita testator.* hath it been resolved, and where administration is granted, it is only *omnium bonorum*, without speaking of chattels; yet hath the administrator interest in leases as well as moveables. On the other side, the stat. *de prerog. reg.* mentioning only forfeiture *de catallis* is clearly extended to moveables: so also in the writ of assize *De catallis que in eo capta fuerint*, and in the writ of

Cap. 28.

4 E. 3. c. 7. So
the stat. 5.
R. 2. ca. of
Forfeiture.
of goods by
those who
goe beyond
the Sea, Ca.
16. In all
these goods
are compre-
hended.

of execution upon a statute, there is only the word *catalla*, and not *bona*; and in the case reported by *Kelway temp. Henry* the seventh, it seemes *bona & catalla* were taken for *Synonyma*, or all one. It doth not appeare that these statutes and writs were alledged or considered of *temp. Edw. 6.* but in *Portmans* case the most of them were.

13. H. 7.
Kelw. rep.
35. a.

If one will that his wife or any other shall have, or hold, or enjoy the moiety of his lease with his Executor. This implyeth not that the Executor have the other moiety as a legacy also, but otherwise as the Law casts it upon him, no more than where the moiety of fee-simple land is devised to the younger son, this shall not make the elder son to have the other moiety otherwise than by descent, as betweene *Low* and *Carter* was conceived. But there being a Proviso in the wives bequest, that if she married from the house, then, &c. *Popham* cap. Justice, held, that if she married at all, this was a marrying from the house, for she was no longer widow of that house, though she married with one of that kindred, and who had no other house, but would dwell in the bequeathed.

Low & Cart.
case Tr. 37.
Elinb. reg.

CHAP.

CHAP. XX.

Of the Executor of an Executor.

Sec Plow.
184. a debt.
against the
executor of
an executor.

19 Ed. 2. and
14 Ed. 3.
Fit. executor
87. & 103.

I Should be taxed of omission, if I should not shew whether the things fore-spoken of Executors immediate, extend also to the mediate or more remote Executors. Assuredly, were I not by the bookes otherwise informed, I should thinke it somewhat strange, that the mediate Executor in the fourth, fifth, or further degree should not by the rules of the Common Law, stand in like plight Executor to the first Testator, as the first and immediate Executor, as well as the heire, and assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate heire, and assignee. And indeed we find both in the time of *Edward* the second, and *Edward* the third, execution sued out upon a judgment and statute, by an Executor of an Executor, and why he might not as well maintaine an action of debt, &c. I see not. But

I must confesse, I finde both books to the contrary before any statute made in the point and after an act of Parliament to enable them to bring actions, and to make them subject to actions, yet the statute speakes nothing of conferring upon them the testators goods. Now if they had title to them before that statute, and without the helpe of that statute, it is strange if they should not be suable for debts. But since that statute, and at this day where by a will a special trust is recommended to an executor, as to sell land, &c. this not performed in his life time, shall not be performable by his executor: contrarywise of an interest, as to take the profits of lands for certaine years towards payment of debts, and legacies: and where the stat. temp. H. 3. gives remedy to executors for recovery of rents of inheritance behind in the testators life, I doubt not but executors of executors are within the equity as well as within the stat. 9. Ed. 3. cap. 3. that the exec. who appears at the grand distresse shall answer alone. Yet the stat. Westmin. 2. cap. 23. for executors, was taken not to extend to Executors of Executors. *Quod non est lex.* So as now in all cases except of

11 Ed. 3. &
13 Ed. 3
Fitzh. Exec.
78. 92
25 Ed. 3. c. 5.

19 H. 2. p. 10
4. El. Dy. 201
32 H. 8. cap.
37. 30 32. H.
8. 28 leases
And 32 H. 8
cap. 34 Con-
ditions, and
13 El. cap. 5
& 27 El. cap.
Of fran-
dulant con-
veyances, 21
H. 8 cap. 13
for falsify-
ing recove-
ries. 39. H. 6
45. 7. H. 3. 63.

B

spe

special trust or authority, without the office of Executorship. The Executor of an Executor, how farre soever in degre remote, stands as to the points both of Being, Having, and Doing, in the same state and plight as the first and immediate Executor.

CHAP. XXI.

Touching Administrators.

OF these also as standing in much affinity with Executors, it may be by some expected that I should have treated. But first my excuse is, that these of Executors only having growne to so great a bulke above expectation, I was unwilling to enlarge it further. Secondly, that which in the points of having, and doing is before set forth, and shewed touching Executors, may be applied to, and understood of Administrators, though not what is spoken of being, and unbeing, or revocation of Executorships, and other circumstantial points.

Lastly, I may perhaps, if these finde good acceptance, adde ere long that
which

which appertaineth to administrators distinguished from executors, or wherein they stand in different state.

CHAP. XXII.

Considerations in conscience, touching payment of Debts, Legacies, and the preferring or respect of persons.

TO the advertisement what course Executors are to hold in their payments, I thought good to add this *in foro conscientie*, That when as it shall stand in the Executors will and election to pay whom he will, and as he will, in respect of equality in the dignity and degree of the debts, all being for the purpose by the specialty, and none of record, and yet he hath not wherewith to pay or satisfie all; Here he may have three wayes or courses in his eye.

First, where there is equality in the honesty and conscience of the debts; there (except in the ability of the parties to beare losse, the disproportion may otherwise occasion) me thinks it should be most honest and just to pay every one

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I.

proportionably, and to let the losse of every one to be equal: and the justnesse of this is taught by the law, which gives the *audita querela* for equal contribution in bearing of losse by them who stand in equal degree: so of legacies.

2. The poverty and inability of some, and the plenty of others, may in *foro conscientie* justifie the paying more to one, and suffering him to lose lesse (if any thing) than another. For if the widowes mite was a greater gift, so a greater losse than more out of abundance. Where charity finds or may finde place or necessesse to place of giving, it may find greater motives of preserving from losse: so of legacies.

3. The nature of the debts, and so sometimes of legacies, may be so different, as thence may spring a just motive to disproportion payments, to pay more to one than another, rate for rate, and so to suffer one to lose more than another. One debt may perhaps be use for money, or at least money lent for use, another may be money freely lent. Another debt for land of inheritance bought; another debt for a lease, chattels or moveables, come to the Executor. The first merits the

the least respect, next the second, then the third, and the last the most: but where without any of these motives there is not equality held in payment, *Peccatur* (as I thinke) *in conscientiam*. But let every one stand or fall by, or to his owne, or to him who is greater than his conscience. This equality Saint *Paul* in another case ^{2 Cor. 8:4} recommends to the *Corinthians*. And *Salomon*, whilest no inequality appeared in the point of right, shewed his disposition to have made an equal division of the childe between the mothers, who were joynt claymers and competitors for it.

See more of conscience *Dott.* and *Stud.*

FINIS.
